DOCKET

(6)

No. 84-5743-CSY
Status: GRANTED
CAPITAL CASE

Title: Brian Keith Baldwin, Petitioner
v.
Alabama

Docketed:
October 23, 1984

Court: Supreme Court of Alabama

Counsel for petitioner: Appell, Roger C., Carroll, John L.

Counsel for respondent: Graddick, Charles A., Carnes, Edward E.

Entry	Date	Note	Proceedings and Orders
1	Oct 23 1984	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Nov 13 1984		Brief of respondent Alabama in opposition filed.
4	Nov 21 1984		DISTRIBUTED. December 7, 1984
6	Dec 10 1984		Petition GRANTED.
			**********
7	Jan 14 1985		Record filed.
8	Feb 4 1985		Joint appendix filed.
9	Feb 5 1985		SET FOR ARGUMENT. Wednesday, March 27, 1985. (4th case).
10	Feb 14 1985		Record filed.
11	Feb 21 1985		Brief of petitioner Brian Keith Baldwin filed.
12	Feb 21 1985		Brief of respondent Alabama filed.
13	Mar 5 1985		CIRCULATED.
14	Mar 27 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

84-5743

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

[redacted]

NO. 83-276

RECEIVED
OCT 27 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BRIAN KEITH BALDWIN, Petitioner

vs.

STATE OF ALABAMA, Respondent

AFFIDAVIT

STATE OF ALABAMA)

COUNTY OF JEFFERSON)

ROGER C. APPELL, being duly sworn, states:

1. I am counsel to Brian Keith Baldwin, who seeks to file a Petition for Writ of Certiorari in this Court, and I make this affidavit in support of Mr. Baldwin's motion for leave to proceed in forma pauperis. My representation of Mr. Baldwin is without renumeration.

2. Mr. Baldwin is presently in the custody of the State of Alabama and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Baldwin by me and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Baldwin is attached hereto.

3. Petitioner had counsel appointed to represent him on his appeal and at trial.

STP

4. I am informed and believe that because of his poverty, Mr. Baldwin is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Baldwin is entitled to redress in this cause for the reason that his sentence of death were obtained in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

ROGER C. APPELL

SWORN to and Subscribed before me, this ___ day of _____, 1984.

NOTARY PUBLIC

My commission expires: _____

RECEIVED
OCT 27 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

5743

84-[redacted]

NO. 83-276

BRIAN KEITH BALDWIN, Petitioner

vs.

STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

ROGER C. APPELL
2000 1ST AVENUE NORTH
BROWN MARX TOWERS
SUITE 824-833
BIRMINGHAM, ALABAMA 35203

Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

NO. 83-276

BRIAN KEITH BALDWIN, Petitioner,

vs.

STATE OF ALABAMA, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Brian Keith Baldwin, who is now confined on death row at the Alabama State Prison known as Holman Unit, asks leave to file the attached Petition for a Writ of Certiorari to the Alabama Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Petitioner's affidavit in support of this motion, a copy of which is attached, will be executed and submitted within ten days.

Respectfully submitted,

ROGER C. APPELL
2000 1ST AVENUE NORTH
BROWN MARX TOWERS
SUITE 824-833
BIRMINGHAM, ALABAMA 35203

ATTORNEY FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. ~~83-276~~

BRIAN KEITH BALDWIN, Petitioner

vs.

STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

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ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 83-276

BRIAN KEITH BALDWIN, Petitioner

vs.

STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

The Petitioner Brian Keith Baldwin respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this proceeding on July 13, 1984.

OPINIONS BELOW

The opinion of the Alabama Supreme Court, is unreported at this time, is attached hereto as Appendix A. The Alabama Court of Criminal Appeals' opinion, is also unreported is attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on July 13, 1984. An application for rehearing was filed in that court and denied on August 24, 1984.

QUESTION PRESENTED

(1) Whether Petitioner's death sentence deprives him of life without due process of law, or denies him the equal protection of the laws or contitutes cruel and unusual punishment or violates his sixth amendment rights since the trial court was required by the Alabama State Statue to consider the jury's constitutionally invalid mandatory death sentence in the sentencing determination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of the Alabama's death penalty statue, which are reproduced in Appendix C.

STATEMENT OF THE CASE

The evidence at trial demonstrated the following principal facts: On November 25, 1976, Petitioner, Brian Keith Baldwin, and another youth, Edward Horsley, escaped from a North Carolina prison camp. Naomi Rolon, a 16-year-old girl, picked them up hitchhiking that night. They took control of her car. Subsequently she may have been raped. Horsley and Petitioner stripped her of most of her clothing, attempted to kill her, and locked her in the trunk of the car. They then drove to Atlanta, and on the following day proceeded to Camden, Alabama. There, Petitioner stole a pickup which contained a hatchet. In an isolate spot, Ms. Rolon was removed from the trunk of the car. After Horsley, driving the car, ran into her, Petitioner struck her with the hatchet, inflicting a fatal wound. Horsley and Baldwin were later arrested in Lanett, Alabama, in the stolen truck.

Petitioner was tried under the Alabama's post-Furman[1], pre-Gregg[2], death penalty statute, Ala. Code §§ 13-11-1 through 13-11-9 (1975). Trial lasted two days (August 8 and 9, 1977) and he was convicted and sentenced to death in Monroe County, Alabama. His conviction and death sentence was affirmed on appeal. Baldwin v. State, 372 So.2d 26(Ala. Cr. App. 1978) aff'd 372 So.2d 32 (Ala. 1979). The judgment of this Court was then vacated and the case remanded by the United States Supreme Court "for further consideration in light of Beck vs. Alabama, ..." Baldwin vs. Alabama, 448 U.S. 903 (1980). Following remandment, the Alabama Court of Criminal Appeals reversed

---

1/ Furman v. Georgia, 408 U.S. 238 (1972).

2/ Gregg v. Georgia, 428 U.S. 153 (1976).

Petitioner's conviction. Baldwin vs. State, 405 So.2d 699 (Ala. Cr. App. 1981). On July 7, 1982, on motion of the Attorney General that court held further proceedings in this case in abeyance. On November 1, 1983, the Court of Criminal Appeals affirmed Petitioner's conviction and death sentence. A timely petition for rehearing was denied on November 29, 1983. On February 22, 1984, the Alabama Supreme Court granted a Petition for certiorari and affirmed the Petitioner's conviction on July 13, 1984 . An Application for Rehearing was denied on August 24, 1984 without opinion.

HOW THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Alabama Supreme Court addressed the issue presented for review, recognized the holding of Ritter v. Smith, and held that they were not bound by that decision.

REASON FOR GRANTING THE WRIT

I. The Requirement under the Alabama Death Statue under Which the Petitioner Was Sentenced to Death Included the Constitutionally Invalid Factor of the Jury's Mandatory Death Sentence in the Sentencing Determination and the Statutory Requirement on the Judge's Sentencing Decision Renders the Statue's Sentencing Procedures Facially Unconstitutional

Petitioner was tried, convicted and sentenced to death under the 1976 Alabama capital sentencing scheme which required the jury to mandatorily sentence him to death and then required the trial judge to accept or reject that standardless jury verdict.

Although the statue and procedure under which the Petitioner was convicted and sentenced to death is exactly the same under which the Eleventh Circuit held to be "facially unconstitutional"[1/] the Alabama Supreme Court denied relief

1/ Ritter v. Smith, 726 F.2d 1505, 1517 (11th Cir., 1984), cert. denied ___U.S. ___ (1984)

based on the proposition that they were not bound by decisions of federal courts. This holding, however, is in direct conflict with prior holdings of this Court and in violating of the rights granted the Petitioner under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

In Ritter, the Eleventh Circuit, analyzed the Alabama death statue under which both Ritter and Petitioner were convicted and sentenced to death and found that the trial judge was required by the express language to weigh the aggravating and mitigating factors, "and the fixing of the punishment at death by the jury," [2/] in fixing the punishment at death. The Eleventh Circuit found that the Alabama Statue violated the constitutional standards in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2736, 38 L.Ed 2d 346 (1972), since a mandatory death sentence which withdrawe all sentencing discretion from the jury, 'results in a distortion of the guilt/innocence determination in order to allow for such discretion." Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Ritter at 1515.

The Court also found that the use of the jury's mandatory death sentence as a factor to be considered in the sentencing process was a factor that is "unguided and standardless, reflects no individualized consideration of the particular defendant or crime and is irrelevant to the sentencing process . . ." Ritter at 1516. This analysis was based on the prior holdings in this Court in Woodson, supra, Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed. 2d 974 (1976) and Beck v. Alabama, 447 U.S. 625, 100 S.Ct 2382, (1980).

2/ § 13-11-4, Code of Alabama, (1975) (repealed 1981)

The Court further concluded that:

> . . . the consitutionally impermissible factor of the jury's mandatory death sentence infects the trial judge's sentencing determination. Although a separate sentencing hearing is held by the trial judge, at which evidence of aggravating and mitigating factors is introduced, the statute requires that in making the determination whether to impose the death sentence after reviewing this evidence the judge must decide whether he will "(r)efuse to accept the deeth penalty as fixed by the jury." Ala. Code § 13-11-4 (1975) (repealed 1981). Moreover, the statute requires the judge to weigh the mandatory death sentence facter in the balance with his consideration of aggravating and mitigating circumstances in deciding to impose the death penalty. Id. Thus, the constitutionally impermissible factor of the jury's mandatory death sentence must be given weight in the judge's own sentencing decision. In Beck the Supreme Court noted the influence of this factor on the judge's sentencing decision:
>
> > It is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Indeed, according to statistics submitted by the State's Attorney General, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate sentencing hearing in aggravation and mitigation before he imposes sentence. 447 U.S. at 645, 100 S.Ct. at 2398. (footnote omited)
>
> In order to arrive at a sentencing determination unaffected by the influence of the jury's mandatory death sentence, the judge must disobey the statutes express requirement that the mandatory death sentence be considered in his decision. Ritter, at 1516.

Although the constitutional mandates of Ritter are clear, the Alabama Supreme Court denied relief to Your Petitioner on the exact same arguments and statue. Thus, Defendant Ritter is mandated a new sentencing hearing while this Petitioner and possibly others face the ultimate punishment under the same constitutional informities. It is therefore requested that certiorari be granted in order that this Petitioner and others in Alabama be granted the same constitutional protections as afforded Defendant Ritter.

CONCLUSION

For the reasons set out in the Petition, certiorari should be granted to consider the constitutionality of the Alabama provision of the repealed death penalty statue that required the sentencing judge to consider the unconstitutional factor of the jury's mandatory death verdict in his decision to sentence an individual to death.

Respectfully submitted,

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EXHIBIT A

FILED
JUL 13 1984
CLERK
SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1984

Ex Parte: Brian Keith Baldwin

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Brian Keith Baldwin

83-276 v.

State)

PER CURIAM.

Brian Keith Baldwin was indicted for, and convicted of, the capital offense of "robbery ... with the aggravated circumstance of intentionally killing the victim." Ala. Code 1975, § 13-11-2(a)(2) (repealed 1981, Act No. 81-178, § 20, but effective as to conduct occurring before July 1, 1981). He was sentenced to death.

The conviction was affirmed originally by the Court of Criminal Appeals in 1978, Baldwin v. State, 372 So. 2d 26 (Ala. Crim. App. 1978), and by this Court in 1979, Ex Parte Baldwin, 372 So. 2d 32 (Ala. 1979) (Baldwin I). After having granted certiorari, the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980). Baldwin v. Alabama, 448 U.S. 903 (1980). This Court remanded the case to the Court of Criminal Appeals, Baldwin v. State, 405 So. 2d 699 (Ala. 1981), which once again affirmed the conviction, Baldwin v. State, [MS. November 1, 1983] ___ So. 2d ___ (Ala. Crim. App. 1983). Baldwin's present petition for writ of certiorari was granted as a matter of right under A. R. A. P., Rule 39(c).

The facts of this case have been set out repeatedly in the above decisions. We only briefly reiterate them. Petitioner and Edward Horsley, escapees from a North Carolina prison camp, abducted their young victim in Hudson, North Carolina. They took control of her automobile and locked her in the trunk. They then drove the car from North Carolina, through South Carolina and Georgia, to Monroe County, Alabama, where they intentionally killed her. Petitioner and Horsley had separate trials in the Circuit Court of Monroe County.

Petitioner now raises these issues:

(1) Was petitioner prejudiced at trial by the existence of the preclusion clause and, therefore, entitled to a new trial under Beck v. Alabama, 447 U.S. 625 (1980)?

(2) Was the prosecutor's remark in his opening statement, that the petitioner had escaped from a prison camp in North Carolina, reversible error?

(3) Was a prospective juror improperly excluded under Witherspoon v. Illinois, 391 U.S. 510 (1968)?

(4) Are the sentencing provisions of the 1975 Death Penalty Act, under which petitioner was sentenced, unconstitutional?

(5) Was it improper to consider the petitioner's prior youthful offender and juvenile adjudications as aggravating circumstances to support the sentence of death?

I.

Petitioner's trial was held in 1977, before the preclusion clause of the 1975 Death Penalty Act was struck down by the United States Supreme Court in Beck v. Alabama, 447 U.S. 625 (1980). The only offense with which petitioner was charged, and for which he was tried, was the capital offense of robbery in which the victim is intentionally killed. In accordance with the then existing preclusion clause, contained in § 13-1-2(a), Ala. Code 1975, the jury was not allowed to consider any lesser included offenses during its deliberations. It returned a verdict of guilty of capital murder.

Petitioner now contends that under Beck v. Alabama, supra, he is entitled to a new trial because he was prejudiced by the existence of the preclusion clause. The complete test to determine the effect of the preclusion clause on a pre-Beck trial was set out in Cook v. State, 431 So. 2d 1322 (Ala. 1983):

> "(1) Was there any evidence presented at trial upon which a conviction of a lesser included offense could have been based? (2) If not, has the defendant suggested any plausible claim which he might conceivably have made, had there been no preclusion clause, that is not contradicted by his own testimony at trial? If the answer to both of these questions is no, then a conviction at trial is due to be affirmed."

Cook v. State, 431 So. 2d at 1324. The first question is taken from Beck v. Alabama, supra. The second one was posed first in Hopper v. Evans, 456 U.S. 605 (1982).

Petitioner asserts that the answer to both questions is yes. We do not agree.

Regarding the first part of the test, petitioner contends that although the murder most probably occurred in Alabama, the great weight of the evidence shows that the robbery, if any, took place entirely within North Carolina, where he and Horsley took control of the victim's car. Petitioner argues that he committed, at most, first degree murder in Alabama, and he would have been entitled to a jury charge on this offense had the preclusion clause not existed.

Alabama's jurisdiction to try and convict petitioner for the capital offense of robbery in which the victim is intentionally killed is not dependent upon the venue of the robbery. Petitioner may be convicted of this offense regardless of where the robbery occurred. Therefore, evidence that the robbery took place in North Carolina does not entitle petitioner to a jury charge on first degree murder. We made this clear in Baldwin I when we defined this capital offense and held that Alabama had jurisdiction to convict petitioner of the crime:

> "The crime of robbery when the victim is intentionally killed is a single offense beginning with the act of robbing or attempting to rob and culminating with the act of intentionally killing the victim. The offense consists of two elements, robbing and intentionally killing, but does not consist of two separate offenses. See Ex parte Clements, 370 So. 2d 723 (Ala. 1979); Horsley v. State, [1 Div. 931] (Ala. Crim. App. 1978). Therefore, although the offense was commenced in North Carolina, it was not consummated until Naomi Rolon was killed in Monroe County, Alabama.
>
> "The place where the crime was consummated is the place where the crime was committed and the place where the defendant may be tried. 21 Am. Jur. 2d Criminal Law § 399, at 416. Section 15-2-4 provides:
>
> "'When the commission of an offense commenced elsewhere is

> consummated within the boundaries of the state of Alabama, the offender is liable to punishment in Alabama, although he was out of the state at the commission of the offense charged, if he consummated it in this state through the intervention of an innocent or guilty agent or by any other means proceeding directly from himself; and venue in such case is in the county in which the offense was consummated, unless otherwise provided by law.'
>
> "§ 15-2-4, Code 1975.
>
> "Accordingly, venue did lie in Monroe County and petitioner was properly tried and convicted. The decision of the Court of Criminal Appeals is affirmed."

Baldwin I, 372 So. 2d at 33, 34.

We have searched the entire record and have found no other evidence to support a verdict of guilty of a lesser included offense. Petitioner is not entitled to a new trial under Beck v. Alabama, supra, and the answer to the first question must be no.

Prior to closing arguments at trial, the trial court ruled that Alabama had jurisdiction to convict the petitioner of the capital offense, if both the robbery and the intentional killing occurred in Alabama. It also determined that the venue of the crime was a question of fact to be determined by the jury. It instructed the jury accordingly:

> "I think this case really comes down to this, ladies and gentlemen. I want to put it to you in two different questions. There are two questions that this jury must answer: First, did the defendant rob Naomi Rolon in Monroe County, Alabama, as I have defined the term? Second, did the defendant intentionally kill Naomi Rolon in Monroe County, Alabama, in the course of said robbery?
>
> "If each and every one of you are convinced beyond a reasonable doubt and to a moral certainty that the answer to each of these questions is 'yes,' your verdict should be guilty. If you are

> not so convinced, your verdict should be not guilty."

Petitioner correctly argues that the decision in Baldwin I necessarily holds that the trial court's charge to the jury was incorrect. However, petitioner was not prejudiced by this error. Under the court's charge, the jury was required to find not only that the petitioner intentionally killed the victim in Monroe County, but also that he robbed her there. This charge, although erroneous, was to petitioner's benefit, not his detriment. Petitioner argues otherwise. He contends that this charge presented to the jury the very dilemma that the United States Supreme Court hoped to eradicate by its decision in Beck v. Alabama, supra. It was concerned that a jury would convict a defendant of a capital offense, even if it had some doubt as to the existence of some element of the crime, rather than let the defendant go free. However, we find that petitioner's case is different. Even if the jury had some doubt about the venue of the robbery, its conviction on the capital offense is supported by the evidence, because, under Baldwin I, petitioner is guilty of the offense, regardless of where the robbery took place. The effect of the incorrect jury instruction made it more difficult to convict petitioner, but it did not result in an unconstitutional conviction.

Petitioner next argues that if we affirm Baldwin I, which we have done, then his defense at trial was invalid and frivolous, and, consequently, he received ineffective assistance of counsel.

The burden of proof is upon the petitioner. The United States Supreme Court, in a very recent decision, Strickland v. Washington, ___ U.S. ___ (1984) [No. 82-1554, 52 U.S.L.W 4565], explicitly described the burden of proof with regard to this claim. First, petitioner must show that counsel's performance was so deficient as to fall below an objective

standard of reasonableness. Counsel's conduct must be considered within the context of the facts of the particular case and as of the time of the alleged misconduct. Second, petitioner must show that counsel's deficient performance prejudiced the defense and deprived petitioner of a fair trial. Prejudice is shown when, absent the errors, there is a reasonable probability that the jury would have had a reasonable doubt respecting guilt.

At the time of the trial, the defense asserted was not frivolous, because, if the jury had believed petitioner and found the facts to be as he contended, i.e., that the robbery occurred in North Carolina, he would have been acquitted of the charge. Therefore, under the law of the case, trial counsel's decision to use this defense against the charge was sound. Counsel did not fail in the performance of his duty to present the best defense possible under the law. We need not consider the second factor of the test in Strickland.

Returning to the test in Cook v. State, supra, for the effect of the preclusion clause, we answer the second question of that test in the negative also. Petitioner has not suggested any plausible claim which he would have made had there been no preclusion clause. Petitioner must not only suggest a defense which he might have made, but he must also show that he did not assert the defense because of the preclusion clause. Hopper v. Evans, supra; Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984), petition for cert. filed, 52 U.S.L.W. 3875 (U.S. May 15, 1984). If we did not require this last showing, petitioner conceivably could assert any defense which has now occurred to him and demand that he be given a new trial at which he may raise a new defense. This could not be what the United States Supreme Court intended in Hopper v. Evans, supra, when it formulated this part of the test. That court was concerned with the effect the

preclusion clause had upon the trial, i.e., whether the "brooding omnipresence" of the preclusion clause in any way influenced the defendant's decision on how to defend against a capital charge. The Supreme Court specifically stated that "a defendant might make a plausible claim that he would have employed different trial tactics -- for example, that he would have introduced certain evidence or requested certain jury instructions -- but for the preclusion clause." (Emphasis added.) Hopper v. Evans, 456 U.S. at 612-13 n. This should not be construed as an invitation to all defendants tried under the 1975 Death Penalty Act to defend against the capital charge anew before the appellate courts, asserting any new defense not presented at trial, without regard to whether it was one that was considered and discarded because of the preclusion clause.

Petitioner suggested during oral argument that he might have defended by presenting evidence that at the time of the killing he was under the influence of narcotics and unable to form the specific intent to kill. There was no showing that the existence of the preclusion clause stopped petitioner from asserting this defense. There is not even an inference that this was the case. Petitioner could have made this defense at trial and have been acquitted, if it were successful. The jury was charged that specific intent was an element of the capital offense, and that it must find that specific intent in order to return a verdict of guilty. No other claims are put forth by petitioner.

We hold that petitioner was not prejudiced by the existence of the preclusion clause and that he was not entitled to an instruction on a lesser included offense. There was no evidence presented at trial which would have supported a conviction of a lesser included offense, nor has petitioner suggested any plausible claim which he would have made but for the preclusion clause.

II.

Petitioner contends that he was denied an impartial jury as guaranteed by the Sixth Amendment of the United States Constitution, because one of the prospective jurors was excluded improperly. He contends that this prospective juror was excluded solely because she would not fix punishment at death even if she "were convinced beyond a reasonable doubt of the guilt of this defendant." He argues that Witherspoon v. Illinois, 391 U.S. 510 (1968), requires that a juror be excluded only "if [s]he is irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." Witherspoon v. Illinois, 391 U.S. at 522, n. 21. Petitioner insists that this juror was excluded for reasons which fall below the standard set in Witherspoon.

The Court of Criminal Appeals held that this prospective juror was not excluded in violation of the principles of Witherspoon. That Court, upon review of the pertinent portion of the record, which is set out in the opinion, found that the prospective juror "unequivocally told the trial judge that she could not, under any circumstances, impose the death penalty on this appellant, and that she would automatically vote against its imposition." Baldwin v. State, ___ So. 2d ___ (Ala. Crim. App. 1983). It noted that the trial court does not have to use the exact words of the United States Supreme Court in Witherspoon during examination of the jurors in order to fulfill the standards set by that decision.

We adopt the holding of the Court of Criminal Appeals and add one citation. In Ex Parte Dobard, 435 So. 2d 1351 (Ala. 1983), we affirmed the exclusion of a prospective juror who had a "fixed opinion against capital punishment"

and who would not be able "to return a verdict sentencing someone to the electric chair if they were found guilty beyond a reasonable doubt and to a moral certainty of the crime of the charges." Dobard, 435 So. 2d at 1356. The juror's exclusion was proper even though the exact language of Witherspoon was not used by the trial court, because it was "difficult to envision how [the] ... prospective juror could have been more explicit in expressing an unqualified opposition to the death penalty." Dobard, 435 So. 2d at 1356. Similarly, in this case, a review of the transcript of the voir dire examination of the prospective juror whose exclusion is questioned makes it unmistakably clear that this prospective juror would not vote for the death penalty under any circumstance.

For these reasons and the reasons contained in the opinion of the Court of Criminal Appeals, we hold that the prospective juror's exclusion was proper and that petitioner was not denied his constitutional right to an impartial jury.

III.

Petitioner next argues that the prosecutor's remarks during his opening statement, that petitioner had escaped from a North Carolina prison camp only hours before meeting the victim and abducting her, were reversible error. The rules regarding what is permissible during opening statement are well settled:

> "Erroneous insistences and prejudicial conduct on the part of district attorneys tend unduly to prejudice and bias the jury against the defendant. It is not permissible for the solicitor to make an emphatic statement that the defendant is guilty of the crime charged. Rowland v. State, 31 Ala. App. 605, 20 So. 2d 881 (1945). The prosecution's opening statement to the jury on what it expects to prove should be confined to statements based on facts admissible in evidence. Higdon v. State, 25 Ala. App. 209, 143 So. 213 (1932). Counsel, however, is to be

> allowed considerable latitude in presenting to the jury in his opening statement what he expects the evidence to show. Rogers v. State, 49 Ala. App. 78, 268 So. 2d 859 (1972). The trial judge must be given wide discretion in determining whether the making of a certain utterance by the District Attorney requires that a mistrial be granted. Ballard v. State, 51 Ala. App. 393, 286 So. 2d 68 (1973)."

White v. State, 294 Ala. 265, 314 So. 2d 857, 861-2 (1975); cert. denied, White v. Alabama, 423 U.S. 951 (1975); reh. denied, 423 U.S. 1039 (1975).

The issue then is whether the questioned remark was based on facts admissible in evidence. The Court of Criminal Appeals properly answered this question:

> "Generally, evidence of other crimes which a defendant has committed is not admissible at his trial on a particular offense. McElroy's Alabama Evidence, § 69.01(1), Third Edition (1977). However, the prosecutor's statement falls within one of the widely recognized exceptions to the general rule.
>
> "'... [I]f two or more crimes constitute one criminal transaction, evidence of the other crime or crimes is admissible. In Parsons v. State, 251 Ala. 467, 477, 38 So. 2d 209, it was stated:
>
> "'"But the rule is that if several crimes in fact constitute one criminal transaction, evidence of all such crimes may be given as part of the res gestae of the offense with which defendant is charged. Allison v. State, 1 Ala. App. 206, 55 So. 453; Askew v. State, 6 Ala. App. 41, 60 So. 455; Ingram v. State, 39 Ala. 247, 84 Am. Dec. 782."
>
> "'Judge McElroy, citing numerous supporting authorities, has the following to say on the subject:
>
> "'"Evidence of accused's commission of another crime is admissible if such other crime is inseparably connected with, or is a 'part of the res gestae' of the, now-charged crime; or, if such other crime and the now-charged crime are

> parts of one continuous transaction or one continuous criminal occurrence...'" McElroy, Law of Evidence in Alabama, § 69.01(3)."

"Brown v. State, 338 So. 2d 1050 (Ala. Crim. App. 1976).

> "From a review of the record, it is clear to this court that this escape commenced the series of events that eventually led to the killing of the victim herein."

Baldwin v. State, ___ So. 2d at ___ (Ala. Crim. App. 1983).

Evidence of the escape is admissible under this exception, and such evidence, in fact, was admitted. Petitioner's sworn statement, in which he told of his escape and the subsequent events, was admitted. The prosecutor was within reason at the time he delivered his opening statement to expect that such evidence would be admitted.

We do not find any abuse of discretion by the trial court in allowing the remark to be made to the jury during the prosecutor's opening statement and, accordingly, affirm the Court of Criminal Appeals decision that there was no reversible error committed.

We hold that petitioner was not entitled to a jury instruction on a lesser included offense. We also hold that there was no reversible error committed during the trial. We have reviewed the entire record of the trial proceeding and find no error which "has or probably has adversely affected the substantial rights of the petitioner." A. R. A. P., Rule 39(k). Accordingly, we affirm the conviction.

IV.

We now consider petitioner's challenge to the sentencing phase of the proceedings. He contends that the sentencing provisions of the 1975 Death Penalty Act, under which he was sentenced, are unconstitutional.

The relevant provisions state:

> "§ 13-11-2(a) If the jury finds the defendant guilty [of one of the aggravated offenses listed in § 13-11-2], it shall fix the punishment at death....
>
> "....
>
> "§ 13-11-3. If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole....
>
> "§ 13-11-4. Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death."

These provisions have never been held to be unconstitutional by this Court or by the United States Supreme Court. Ritter v. State, 429 So. 2d 928 (Ala. 1983); Beck v. State, 396 So. 2d 645 (Ala. 1980). The Eleventh Circuit Court of Appeals, in Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984), however, has held recently that these sentencing provisions are unconstitutional on their face.

Petitioner relies solely upon this Eleventh Circuit decision to support his argument that the 1975 sentencing procedure is unconstitutional. This issue was raised by Ritter on a petition for writ of habeas corpus.

The Eleventh Circuit first noted that the 1975 sentencing procedure (§ 13-11-4) provides for a mandatory death sentence by the jury. The Court held that such a death sentence "is unguided and standardless, reflects no consideration of the particular defendant or crime, and is irrelevant to the sentencing process," Ritter v. Smith, 726

F.2d at 1516, and is, therefore, unconstitutional. The Court recognized that in Alabama the trial judge, not the jury, is the sentencing authority, and that a separate sentencing hearing is held by the trial judge after the jury returns a verdict of guilty of a capital offense. However, it found that

> "the statute [§ 13-11-4] requires the judge to weigh the mandatory death sentence factor in the balance with his consideration of aggravating and mitigating circumstances in deciding to impose the death penalty. Id. Thus, the constitutionally impermissible factor of the jury's mandatory death sentence must be given weight in the judge's own sentencing decision."

The Eleventh Circuit Court of Appeals concluded by holding that

> "the inclusion of the constitutionally invalid factor of the jury's mandatory death sentence in the sentencing determination, and the statutorily required influence of that invalid factor on the judge's sentencing decision, renders the 1975 Alabama death penalty statute's sentencing procedures facially unconstitutional."

Ritter v. Smith, 726 F.2d at 1516-1517.

The United States Supreme Court has also considered the constitutionality of the 1975 sentencing procedure in Alabama v. Evans, ___ U.S. ___, 103 S. Ct. 1736 (1983). The Court vacated a stay of execution which had been granted by the district court. In doing so, it stated that "[r]espondent's petition for writ of habeas corpus filed on April 21, 1983, [in the District Court for the Southern District of Alabama] thus seeks to litigate several issues conclusively resolved in prior proceedings [including the constitutionality of the 1975 sentencing procedure] and a claim never before raised." Alabama v. Evans, ___ U.S. at ___.

A stay is issued "only if there is a substantial question to be preserved for further proceedings in the

courts." Rosenberg v. United States, 346 U.S. 273, 288 (1953). Therefore, in order to vacate a stay of execution, the Supreme Court must review all of the issues to determine if any of them are "substantial" and unanswered.

The Supreme Court in Alabama v. Evans, supra, did review the issue that Ritter raised and which petitioner now raises and did not find that it was a "substantial" question. Evans was executed on the same day, but after the stay was vacated. We cannot presume that the Supreme Court would have allowed the execution to take place if it had had even the slightest doubt whether Evans's challenge to the sentencing procedure had some merit.

This Court also addressed the constitutionality of the 1975 sentencing procedure, one year before the Eleventh Circuit's decision was handed down, in Ritter v. State, 429 So. 2d 928 (Ala. 1983), upon remand from the United States Supreme Court for consideration in light of Hopper v. Evans, 456 U.S. 605 (1982). Ritter v. Alabama, 457 U.S. 1114 (1982). Like petitioner, Ritter was tried in 1977 under the original 1975 Death Penalty Act. He has never been retried or resentenced. We held, Ritter v. State, 429 So. 2d 928, as did the Eleventh Circuit, Ritter v. Smith, 726 F.2d 1505, that Ritter was not prejudiced by the existence of the preclusion clause at the time of his trial and is not entitled to a new trial under Beck v. Alabama, supra, or Hopper v. Evans, supra. This is also what we held in petitioner's case. However, unlike the Eleventh Circuit, we upheld the sentencing provisions of the 1975 act. We reaffirm that holding today.

Section 13-11-2(a) of the 1975 act mandates that "[i]f the jury finds the defendant guilty, it shall fix the punishment at death." The jury has no discretion in sentencing. The statute also makes it clear, however, that

the court, not the jury, is the sentencing authority and that the jury's sentence of death is merely advisory.

> "The requirement that the jury fix punishment of death if it finds the defendant guilty is in no way binding on the trial court in the latter's role as the sentencing authority. Section 13-11-4 provides in pertinent part that, 'notwithstanding the fixing of the punishment at death by the jury...,' the court, following the sentencing hearing and after weighing the aggravating and mitigating circumstances may sentence the defendant to either death or life imprisonment. See, Beck v. State, 396 So. 2d 645 (Ala. 1980). Under Alabama's statute the trial court and not the jury is the sentencing authority. Jacobs v. State, 361 So. 2d 640 (Ala. 1978)."

Furthermore,

> "Additionally, by providing for separate proceedings for determination of guilt and punishment, Alabama's death penalty statute eliminates those vices enumerated in Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976). In Roberts, the court pointed out the constitutional weakness of a mandatory death sentence:
>
> > "'The constitutional vice of mandatory death sentence statutes -- lack of focus on the circumstances of the particular offense and the character and propensities of the offender -- ....' (Emphasis added.)
>
> "That point was reemphasized in Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), when the Supreme Court said that capital sentencing decisions must focus 'on the circumstances of each individual homicide and individual defendant.' See also, Enmund v. Florida, ___ U.S. ___, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (O'Connor, J., dissenting). This rationale is for the purpose of 'determin[ing] independently whether the imposition of the ultimate penalty is warranted.' Proffitt, at 428 U.S. at 253, 96 S. Ct. at 2967.
>
> "In Ritter's case, the trial court had a separate sentence hearing and considered, as it appears in its findings after that hearing, each and every aggravating factor in § 13-11-6 and each and every mitigating factor in § 13-11-7, as well as giving the prosecution and defense an opportunity to present any evidence, documentary or

> otherwise, as well as to present arguments, as envisioned under § 13-11-3."

Ritter v. State, 429 So. 2d at 935-36.

We emphasize that the trial court must conduct a separate sentencing hearing, which is independent of the guilt phase of the proceeding. Section 13-11-4 requires the court to weigh all of the aggravating circumstances against all of the mitigating circumstances, and make its sentencing determination. The court shall either sentence the defendant to death, and necessarily accept the jury's sentence, or sentence the defendant to life imprisonment without parole, and necessarily reject the jury sentence.

We hold that the sentencing procedure under the 1975 Death Penalty Act is constitutional, even though the jury has no discretion in sentencing. The statute is saved by the fact that the court, which is the sentencing authority, considers the circumstances of the particular offense and the character and propensities of the offender, i.e., the aggravating and mitigating circumstances, in a separate and independent sentencing hearing, and then imposes the sentence.

In Beck v. State, 396 So. 2d 645 (Ala. 1980), we held that a defendant accused of a capital crime should thereafter receive a bifurcated trial. We were concerned that, absent the preclusion clause, a jury would refuse to convict a defendant of a capital crime proven beyond a reasonable doubt because of the enormity of the sentence and the apparently mandatory nature of the death sentence. The bifurcated trial eliminates this "risk that the jury will use its power to decide guilt to make a de facto punishment decision." Beck v. State, 396 So. 2d at 660.

However, it has never been held that all defendants sentenced under the 1975 act must be resentenced in accordance with the procedure set out in Beck v. State,

supra. The United States Supreme Court (Stewart, Powell, and Stevens, JJ.), in Gregg v. Georgia, 428 U.S. 153 (1976), stated:

> "We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting Furman's constitutional concerns."

Gregg v. Georgia, 428 U.S. at 195.

We accordingly hold that petitioner is not entitled to be resentenced under Beck v. State, supra. The risk with which we were concerned in Beck was not present at petitioner's trial. He was not entitled to an instruction on a lesser included offense. The jury could either acquit or convict him of the capital offense. Even though the jury was instructed to sentence him to death if it found him guilty, it convicted him. He was not prejudiced by the fact that the jury had no discretion to consider any sentence except death. True, he could have been sentenced to life without parole by the trial judge, who had that decision to make, since he was not bound by the jury's sentence.

V.

Petitioner argues that the trial judge improperly considered two prior juvenile adjudications, rendered in the state of North Carolina, as aggravating circumstances in support of the death sentence.

The Court of Criminal Appeals addressed this issue and held that it was improper to consider one of the prior adjudications. That court found that the elimination of this one, non-statutory, aggravating circumstance did not affect the balance. It was convinced that the sentencing

judge would have sentenced petitioner to death, even absent this aggravating circumstance. Having found the error to be harmless error, it affirmed the sentence of death. Baldwin v. State, ___ So. 2d at ___ (Ala. Crim. App. 1983).

We have studied the record and the opinion of the Court of Criminal Appeals, and we agree. We would be hard pressed to improve upon the opinion of the Court of Criminal Appeals and, therefore, we adopt that part of it which is addressed to this issue, and we affirm the sentence.

VI.

The sentence of death was not imposed in an arbitrary or capricious manner, nor was it handed down under the influence of passion or prejudice. The sentence was appropriate, as the aggravating circumstances greatly outweighed the mitigating circumstances. We take judicial notice that other defendants convicted of this offense have also received sentences of death. Most notably, Edward Horsley, petitioner's accomplice, has been sentenced to death. Horsley v. State, [MS. November 29, 1983] ___ So. 2d ___ (Ala. Crim. App. 1983).

Accordingly, the conviction of petitioner and the sentence of death are affirmed.

AFFIRMED.

Torbert, C. J., Maddox, Faulkner, Almon, Shores, Embry, and Adams, JJ., concur.

Jones, J., concurs in part and dissents in part.

Beatty, J., dissents.

JONES, JUSTICE (concurring in part and dissenting in part).

I dissent only as to Part IV--that portion of the opinion relating to the sentencing phase of the trial. In other words, I would affirm as to all aspects of the appeal except that I would reverse the sentence and remand to the Court of Criminal Appeals with instructions to remand to the trial court for a new sentencing hearing. Consistent with the views expressed in my dissent in Ritter,[1] with which Justices Maddox and Adams concurred (and also consistent with Justice Maddox's special concurring opinion on rehearing,[2] in which I, along with Justice Adams, concurred), I believe the restructured, bifurcated proceedings established by this Court in Beck upon remand require a new sentencing hearing. Beck v. State, 396 So. 2d 645 (Ala. 1980) (Beck II).

I do not reach the constitutional question addressed by Judge Johnson, writing for the 11th United States Circuit Court of Appeals in Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984), holding Alabama's pre-Beck II mandatory death sentence by the jury, in the event of a guilty verdict, constitutionally defective. These considerations are not of primary concern from the standpoint of State law, however, in light of Alabama's statutory scheme of sentencing, as judicially modified by Beck II upon remand.

Because the trial judge is the ultimate sentencing authority, reasons the majority, the mandatory death

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1. Ritter v. State, 403 So. 2d 155 (Ala. 1981).

2. The characterization of Justice Maddox's opinion as "concurring specially in denial of rehearing" is an obvious inadvertence and not in keeping with the content of his opinion. His opinion reinforces what I had written in dissent on original deliverance. Because three Justices (Maddox, Adams, and I) would not have reversed the conviction, we necessarily addressed the validity of the sentence issue. Because the majority was reversing and remanding for a new trial as to both the conviction and the sentence, it had no occasion to address the separate issue of whether Ritter was entitled to a new trial as to the sentencing phase only.

sentence imposed by the jury is of no consequence (i.e., such procedure is not prejudicial error), where the conviction is due to stand for lack of a meritorious lesser included offense challenge.

In my opinion, this overlooks the statutory scheme (unchanged by this Court's Beck II opinion) that gives the jury a vital role in the sentencing process. It may well be that, under the United States Supreme Court's guidelines for administering the death penalty, the statutory scheme would meet federal constitutional muster if the jury's role in the sentencing process had been omitted altogether (assuming, of course, that the statute prescribes an appropriate bifurcated sentencing hearing before the trial judge). But it was not omitted. Indeed, the trial judge is statutorily mandated to consider the jury's verdict of sentence. Under pre-Beck II law, only by acquitting the defendant was the jury authorized to render any verdict other than death. In other words, Baldwin's jury could either find him not guilty, or find him guilty and sentence him to die.

If one of the factors that the trial judge must duly consider in the exercise of his sentencing prerogative is the sentence pronounced by the jury, then, under the pre-Beck II mandatory sentencing procedure, that judicial consideration is necessarily confined to the jury's sentence of death. It is not a matter of not trusting the trial judge to exercise his independent judgment, just the opposite. To be sure, I trust our State trial judges to follow the spirit, as well as the explicit mandate, of the statute requiring them to give due consideration to the jury's pronouncement of sentence, and to exercise their independent judgment accordingly.

Obviously, the legislature, in retaining the jury's role in the two-step sentencing process, intended for the

benefit of the community's input as expressed in the jury's "recommendation" of sentence. That legislative will--as a due process requisite--is thwarted where the jury is legally bound to "recommend" only the death penalty.

BEATTY, JUSTICE (dissenting):

I adhere to my dissent expressed in Baldwin I, 372 So. 2d 32 (Ala. 1979).

EXHIBIT B

FILED
NOV 1 1983
ALA COURT CRIMINAL APPEALS
MOLLIE JORDAN, CLERK

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1983 - 84

1 Div. 901

Brian Keith Baldwin

v.

State of Alabama

Appeal from Monroe Circuit Court

TYSON, JUDGE

Brian Keith Baldwin was indicted for the capital offense of robbery when the victim is intentionally killed by the defendant. At trial, the jury found the appellant "guilty as charged in the indictment." The trial judge, after weighing the aggravating and mitigating circumstances in this case, fixed the appellant's punishment at death by electrocution.

See Appendix A, hereto attached and made a part hereof.

The appellant's conviction was originally affirmed by this court in Baldwin v. State, 372 So.2d 26 (Ala.Crim.App. 1978) and by the Alabama Supreme Court at 372 So.2d 32 (Ala. 1979). The United States Supreme Court vacated the judgment and remanded the case for further consideration in light of Beck v. Alabama,[1] 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). Thereafter, the Alabama Supreme Court remanded the case to this court for further consideration and we reversed and remanded on authority of Beck. The State has requested a rehearing and for the reasons set forth below, we once again affirm this appellant's judgment of conviction and sentence of death.

The facts of this case as set out in this court's original opinion and quoted by the Alabama Supreme Court, are as follows:

> "The victim of the appellant's vicious crime was a sixteen-year-old girl named Naomi Nolon. On November 25, 1976, she was driving across town in Hudson, North Carolina, to visit her father who was in a local hospital. She was abducted before reaching her destination by the appellant and his companion, Edward Horsley, both of whom were escapees from a North Carolina prison camp at the time. They took control of her automobile and drove to Charlotte, North Carolina, where they attempted to rape her and to choke her to death. They stripped her of all her clothing except her shoes and socks. She was stabbed with a knife in various parts of her body and then locked in the trunk of the automobile she had been driving. Baldwin and Horsley then drove the car through South Carolina to Atlanta, Georgia, where they spent the night. They next drove to Montgomery, Alabama, on Interstate Highway 85 and then proceeded to Camden, Alabama, located in Wilcox County. The victim remained locked in the trunk of the car during the entire trip.
>
> "In Camden, the appellant stole a pickup truck which contained a hatchet. Horsley drove the automobile, and the appellant drove the truck to an isolated spot in Monroe County. There they removed the victim from the trunk of the car, and Horsley attempted to run the car over her. After several unsuccessful attempts to kill the victim with the automobile, the appellant took the hatchet from the trunk and killed her with a blow leaving a gaping wound in the base of her neck. The two killers were later arrested in Lanett, Alabama, where they were traveling in the stolen truck. The automobile tag from the victim's car was found in the truck which appellant was driving. Both were transported to the Wilcox County Jail on the truck theft charge."

Baldwin v. State, 372 So.2d 26 (Ala.Crim.App. 1978).

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[1] In Beck, the United States Supreme Court invalidated the preclusion clause in Alabama's death penalty statute because the jury was forbidden to consider any lesser included offenses. This clause was in effect at the time the appellant was tried and convicted.

I

The first issue the appellant raises is essentially the same issue he raised on his initial appeal and which was addressed both by this court and the Supreme Court in the two previous opinions. However, this court must now analyze this issue in a different light because of Beck.

The principal question this court must resolve is whether the appellant is entitled to a new trial because the preclusion clause was in effect at the time of his conviction for the instant offense. The appellant contends that although the intentional killing most probably took place in Alabama, the robbery occurred in North Carolina. If such was the case, the appellant claims the State of Alabama did not have jurisdiction over the robbery and thus the appellant could have only been convicted of first degree murder at most in Alabama. Thus, the jury should have been entitled to an instruction on the lesser included offense of murder.

The United States Supreme Court in Hopper v. Evans, _____U.S._____, 102 S.Ct. 2049, _____L.Ed.2d _____(1982) stated:

> "Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence."

Thus,"'[t]he jury must be permitted to consider a verdict of guilt of a non-capital offense' only when 'the evidence would have supported such a verdict.' (Additional emphasis supplied.) Hopper v. Evans, supra." Bryars v. State, [Ms. 3 Div. 396, August 30, 1983] ___So.2d ___(Ala.Crim.App. 1983).

Following the United States Supreme Court's decisions in Beck and Hopper, the Alabama Supreme Court in Cook v. State, 431 So.2d 1322 (Ala. 1983) stated that in the determination of whether an appellant, who was convicted of a capital offense when the preclusion clause was in effect, is entitled to a new trial, the test to be applied is:

> "(1) Was there any evidence presented at trial upon which a conviction of a lesser included offense could have been based? (2) If not, has the defendant suggested any plausible claim which he might conceivably have made, had there been no preclusion clause, that is not contradicted by his own testimony at trial? If the answer to both of these questions is no, then a conviction at trial is due to be affirmed."

The evidence at trial conclusively established that the appellant and his companion took control of the vehicle in which the victim was driving in North Carolina. There was some conflicting evidence presented as to whether the victim was killed in Alabama or North Carolina. The appellant urges that if the robbery occurred in North Carolina and the killing took place in Alabama, then he could only be convicted of murder in Alabama and robbery in North Carolina because the two acts were separate offenses. Thus, reversible error occurred because the jury was prohibited by the preclusion clause from considering the lesser included offense of murder.

We do not agree. As Judge Bookout stated in his opinion in this appellant's original appeal, quoting from the opinion in the appellant's companion's appeal [Horsley v. State, 374 So.2d 363 (Ala.Crim.App. 1978)]:

> " 'Notwithstanding the importance of robbery as an essential element of the crime charged, it did not constitute the crime charged in the indictment or a crime proscribed by the death penalty statute. No crime proscribed by that statute falls short of an intentional killing. Each of the fourteen crimes enumerated in the statute has within it the culminating factor of an intentional homicide. The statute is for the prevention and punishment of homicides committed under legislatively determined aggravating circumstances. It is impossible to complete, to consummate, any of the fourteen crimes enumerated without the intentional[ly] taking of the life of a human being. . .' "

Baldwin v. State, 372 So.2d 26 (Ala.Crim.App. 1978).

Justice Torbert, reiterating this position in his opinion in this case said:

> "The crime of robbery when the victim is intentionally killed is a single offense beginning with the act of robbing or attempting to rob and culminating with the act of intentionally killing the victim. The offense consists of two elements, robbing and intentionally killing, but does not consist of two separate offenses. See Ex parte Clements, 370 So.2d 723 (Ala. 1979); Horsley v. State, [1 Div. 931] (Ala. Crim.App. 1978). Therefore, although the offense was commenced in North Carolina, it was not consummated until Naomi Bolon was killed in Monroe County, Alabama."

Baldwin v. State, 372 So.2d 32 (Ala. 1979).

Therefore, the robbery at issue was a continuing offense which began in North Carolina and culminated in Alabama. Thus, this issue was resolved by the jury which properly found that the robbery and the killing occurred in Alabama.

Furthermore, even if there was evidence that both the robbery and intentional killing took place in North Carolina, the appellant would still not be entitled to request a lesser included offense instruction. If both of these crimes were committed in North Carolina, then Alabama would have no jurisdiction over the case and the appellant could not have been convicted of either offense in Alabama. Whether the killing took place in North Carolina or Alabama was a question for the jury which they properly resolved after considering all of

the evidence.

After reviewing the evidence in this case and the theories which the appellant has raised in light of Beck, and the cases which have followed, we conclude the appellant was not due an instruction on the lesser included offense of murder.

II

The appellant urges that the prosecutor's remark during his opening statement concerning the appellant's escape from a prison camp in North Carolina constitutes error.

Generally, evidence of other crimes which a defendant has committed is not admissible at his trial on a particular offense. McElroy's Alabama Evidence, § 69.01 (1), Third Edition (1977). However, the prosecutor's statement falls within one of the widely recognized exceptions to the general rule.

> ". . .[I]f two or more crimes constitute one criminal transaction, evidence of the other crime or crimes is admissible. In Parsons v. State, 251 Ala. 467, 477, 38 So.2d 209, it was stated:
>
> 'But the rule is that if several crimes in fact constitute one criminal transaction, evidence of all such crimes may be given as part of the res gestae of the offense with which defendant is charged. Allison v. State, 1 Ala.App. 206, 55 So. 453; Askew v. State, 6 Ala. App. 41, 60 So. 455; Ingram v. State, 39 Ala. 247, 84 Am.Dec. 782.'
>
> "Judge McElroy, citing numerous supporting authorities, has the following to say on the subject:
>
> 'Evidence of accused's commission of another crime is admissible if such other crime is inseparably connected with, or is a 'part of the res gestae' of the, now-charged crime; or, if such other crime and the now-charged crime are parts of one continuous transaction or one continous criminal occurrence. . .' McElroy, Law of Evidence in Alabama, § 69.01 (3)."

Brown v. State, 338 So.2d 1050 (Ala.Crim.App. 1976).

From a review of the record, it is clear to this court that this escape commenced the series of events that eventually led to the killing of the victim herein. Thus, the prosecutor's remark was properly allowed.

Furthermore, the appellant's statement was later admitted into evidence and in this the appellant told of his escape from the prison camp and of the unfortunate sequence of events that followed the escape. There is no error on this issue.

III

The appellant contends one of the prospective jurors, Julia Preyear, was improperly excluded from the jury venire and asserts she was excused solely because of her opposition to the death penalty, and not because of the requirements set our in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

The relevant portion of the record is set out below:

> "THE COURT: Mr. Pearson and Mr. Morrow, they seem to be qualified. Do you have any additional questions from the State?
>
> "MR. PEARSON: We have a couple. We would like to know if anybody has any religious scruples, or any other scruples, about fixing punishment at death in this case if the State proves beyond a reasonable doubt that the defendant is guilty.
>
> "THE COURT: Ladies and gentlemen of the jury, do any of you have any scruples, religious or otherwise, which would prevent you from sentencing this defendant to death by electrocution, if, in your mind, his guilt had been established beyond a reasonable doubt and to a moral certainty? (No response.)
>
> "THE COURT: Do you understand the question? Do any of you have any scruples, religious or otherwise, if you were selected as a juror in this case that you could not pronounce the judgment of execution against this defendant if his guilt had been established beyond a reasonable doubt and to a moral certainty?
>
> "A JUROR: Yes, sir.
>
> "THE COURT: Are you a juror?
>
> "A JUROR: Yes, sir.
>
> "THE COURT: What is your name, please?

"A JUROR: Julia Preyear.

"THE COURT: Mrs. Preyear, stand up and tell me what you want to tell me, please.

"THE JUROR, JULIA PREYEAR: I just don't believe in capital punishment.

"THE COURT: You don't believe in capital punishment?

"THE JUROR, JULIA PREYEAR: No,sir.

"THE COURT: Mrs. Preyear, are you telling this Court that if you were on this jury and if you were convinced beyong a reasonable doubt of the guilt of this defendant that you could not or would not follow the law and fix his punishment at death? Is that what you are telling this Court?

"THE JUROR, JULIA PREYEAR: Yes, sir, that's right.

"MR. PEARSON: We would challenge her, Judge.

"THE COURT: The challenge will be sustained as to Mrs. Julia Preyear." (R. 24-25).

In Wilson v. State, 371 So.2d 932 (Ala.Crim.App. 1978), affirmed 371 So.2d 943 (Ala. 1979), vacated on other grounds, 448 U.S. 903, 100 S.Ct. 3042, 65 L.Ed.2d 1133 (1980), remand, 405 So.2d 696 (Ala. 1981), Judge Bowen stated:

> "A prospective juror may be excused for cause where he has been examined by the trial judge and a determination made that the juror's feelings as to capital punishment are sufficiently strong so that he would automatically refuse to impose a death sentence regardless of the evidence produced at trial and despite of the instructions of the trial court. Witherspoon, 391 U.S. at 522, 88 S.Ct. at 1777. In accordance with the general law that allows a juror who is not impartial to be challenged for cause, a prospective juror may properly be excused for cause where his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt. Witherspoon, 391 U.S. 522, n.21, 88 S.Ct. 1770." (Footnotes omitted).

The prospective juror, Mrs. Preyear, made it very clear to the trial judge that she could not sentence the appellant to death if she were convinced the appellant was guilty beyond a reasonable doubt. Certainly, it would be absurd to believe that if she were not so convinced of his guilt beyond a reasonable doubt, that she would consider fixing his punishment

at death.

The appellant claims, citing Witherspoon, supra, that a prospective juror can only be excluded from the venire "if he is irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."

However, it is well recognized that the exact words in Witherspoon do not have to be used when the trial judge examines the prospective jurors concerning their views on the imposition of the death penalty. Wilson v. State, supra.

From our review of the pertinent portion of the record, we are convinced that Mrs. Preyear unequivocably told the trial judge that she could not, under any circumstances, impose the death penalty on this appellant, and that she would automatically vote against its imposition. We conclude that the trial judge's examination of Mrs. Preyear concerning her feelings about capital punishment was proper and that her subsequent exclusion did not offend the principles of Witherspoon.

IV

The appellant argues that the trial judge, during his determination of this sentence, improperly considered two non-statutory aggravating circumstances, and therefore, his sentence of death should not be permitted to stand.

The trial judge in his written findings of fact cited five aggravating circumstances and one mitigating circumstance. (See Appendix A). Three of the aggravating circumstances fall clearly within the list of aggravating circumstances enumerated in § 13-11-6, Code of Alabama 1975 (the Code section in effect at the time of the appellant's conviction) and § 13A-5-49, Code of Alabama 1975. We must now examine more closely the other two aggravating circumstances to determine if they were improperly considered.

A

The first finding that the appellant claims the trial judge should not have considered is set out below:

> "(b) The Court further finds that the defendant had previously plead guilty to a felony in the state of North Carolina involving the use of violence to the person of the victim and was sentenced to five years imprisonment in the North Carolina penitentiary as a youthful offender." (R. 308).

Clearly, a defendant's conviction for a crime of violence can be an aggravating circumstance. Ala.Code § 13-11-6(2) (1975); Ala. Code § 13A-5-49(2)(1975). The question before us is whether the appellant's adjudication as a youthful offender prohibits consideration of that conviction as an aggravating circumstance. Under the Alabama statute, after one is adjudged a youthful offender, any determination of guilt shall not be deemed a conviction,[2/] and thus, could not be an aggravating circumstance under § 13-11-6(2) or § 13A-5-49(2) Code of Alabama (1975). However, the appellant was not adjudicated as a youthful offender in Alabama, but in North Carolina. Therefore, the laws of that state regarding youthful offender status should here govern.

As the state correctly points out in its brief, the intent of the youthful offender statute in North Carolina is completely different from Alabama's youthful offender statute.

In Alabama, the proceedings under the Youthful Offender Act are not criminal in nature and are used to protect persons in a specified age group, who would otherwise be tried as adults, from the harsh consequences of the criminal adjudicatory process." Raines v. State, 294 Ala. 360, 317 So.2d 559 (1975).

> "The Youthful Offender Act is intended to extricate persons below twenty-one years of age from the harshness of criminal prosecution and conviction. It is designed to provide them with the benefits of an informal, confidential, rehabilitative system. A determination that one is a youthful offender (1) does not disqualify the youth from public office or public employment, (2) does not operate as a forfeiture of any right or privilege, (3) does not make him ineligible to receive any license granted by public authority, and (4) shall not be deemed a conviction of crime; and (5) the record shall not be open to public inspection except upon permission of the court. Title 15, § 266(6), Code of Alabama."

Raines v. State, supra. See also commentary in § 15-19-1 through § 15-19-7, Code of Alabama 1975.

The purpose of North Carolina's Youthful Offender Statute is clearly set out in § 148-49.10, N.C. Gen. Stat.:

> "The purposes of this Article are to improve the chances of correction, rehabilitation and successful return to the community of youthful offenders sentenced to imprisonment by preventing, as far as practicable, their association during their terms of imprisonment with older and more experienced criminals, and by closer coordination of the activities of sentencing, training in custody, parole, and final discharge. It is the intent of this Article to provide the courts with an additional sentencing possibility to be used in the court's discretion for correctional punishment and treatment in cases, where in the opinion of the court a youthful offender requires a period of imprisonment, but no longer than necessary for the Parole Commission to determine that the offender is suitable for a return to freedom and is ready for a period of supervised freedom as a step toward unconditional discharge and restoration of the rights of citizenship." (Emphasis added).

In State v. Niccum, 293 N.C. 276, 238 S.E. 2d 141 (1977), the Supreme Court of North Carolina stated:

> "In summary, the purposes of Article 3A[3/] as stated in G.S. 148-49.1 were to improve the chances of rehabilitating youthful offenders: (1) by segregating them, as far as practicable, from older and more experienced criminals; and (2) by providing the court with

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2/ Ala. Code § 15-19-7(a) (1975). There is no similar provision in the North Carolina statutes.

3/ Article 3A was repealed by the North Carolina Legislature 1977 N.C. Sess. Laws, C. 732, S.1, and has been basically reincorporated in Article 3B (which includes § 148-49.10 through § 148-49.16, N.C. Gen. Stat.)

> 'an additional sentencing possibility' to be used for correctional punishment and treatment in cases where, in its opinion, a youthful offender required imprisonment only for the time necessary for the Board of Paroles to determine his suitability for a return to supervised freedom. Article 3A, ipsissimis verbis, could have no application to capital cases.
>
> "As defined in Article 3A, 'a 'youthful offender' is a person under the age of 21 at the time of conviction, and a 'committed youthful offender' is one committed to the custody of the Commissioner of Correction under the provisions of this Article.' G.S. 148-49.2.
>
> "Upon a youthful offender's conviction of an offense punishable by imprisonment G.S. 148-49.4 authorized the court, 'in lieu of the penalty of imprisonment otherwise provided by law,' to sentence him to the custody of the Commissioner of Correction for supervision and treatment pursuant to Article 3A until discharged at the expiration of the maximum term imposed or released conditionally or unconditionally by the Board of Paroles." (Footnote and emphasis added).

It is clear from reading the above cited statute and case that the North Carolina Youthful Offender Statute serves a different purpose than the Alabama statute. A determination of guilt of a youthful offender in North Carolina is a conviction, the same as if he had been tried and found guilty as an adult. The only preferential treatment a youthful offender receives is in the sentencing procedure. Therefore, we conclude that the North Carolina legislature, in inacting their youthful offender statute, intended an adjudication of guilt of a youthful offender to be a conviction, as the term is commonly used. Since the appellant was convicted and sentenced as a youthful offender in North Carolina, we must also consider the appellant's determination of guilt of that offense as a conviction. The trial judge herein properly considered the appellant's conviction under the North Carolina Youthful Offender Statute as an aggravating cricumstance.

B

The second finding which the appellant contends was improperly considered as an aggravating circumstance is as

follows:

> "(c) The Court further finds that the defendant was previously charged in the state of North Carolina with the offense of kidnapping and rape, which said offenses were disposed of in juvenile proceedings by defendant being adjudged delinquent by reason of the charge of assault to commit rape." (R. 309).

Clearly, rape and kidnapping are violent offenses but we cannot analyze an adjudication of guilt in a juvenile proceeding in the same manner as we did as to the appellant's youthful offender conviction. In North Carolina, as in Alabama, juvenile proceedings are not criminal in nature and a determination of delinquency is not a conviction. Section 7A-638, N.C. Gen. Stat.; In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977). The appellant's adjudication of guilt in the juvenile proceedings does not fall within one of the aggravating circumstances enumerated in § 13-11-6 or § 13A-5-49, Code of Alabama 1975. Thus, the question we have before us is whether the appellant's sentence of death can constitutionally be permitted to stand when the trial judge considered an aggravating circumstance not set out in the Alabama code.

Current case law in Alabama indicates that when a trial judge relies upon an invalid aggravating circumstance, the case must be remanded to the trial court for a new sentencing hearing. See Ex Parte Bracewell, 407 So.2d 853 (Ala. 1981) and Judge Bookout's special concurrence in Bracewell v. State, 407 So.2d 848 (Ala.Crim.App. 1979); Johnson v. State, 378 So.2d 1164 (Ala. Crim.App. 1979). But see Mack v. State, 375 So.2d 476 (Ala. Crim.App. 1978) (wherein this court affirmed the death sentence where there was only one valid aggravating circumstance and several invalid aggravating circumstances).

The trial judge's reliance on the non-statutory aggravating circumstance was clearly error. However, in light of two recent United States Supreme Court cases, Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, ___L.Ed.2d ___ (1983) and Barclay v. Florida, _____U.S._____, 103 S.Ct. 3418, ___L.Ed.2d _____ (1983), we must now determine if the consideration of the non-statutory aggravating circumstance constituted "harmless error."

The Barclay decision is more helpful in our analysis of this issue because the Florida death statute is so similar to Alabama's because it also requires the jury and the trial judge to weigh both the aggravating and mitigating circumstances in order to determine whether the death penalty is the appropriate sentence in a particular case. Fla.Stat.Ann. § 921.141 (Supp. 1976-1977). Furthermore, Florida law also forbids the consideration of non-statutory aggravating circumstances in the balancing process. Barclay v. Florida, supra.

In Barclay, the trial judge found several statutory aggravating circumstances but also relied on one non-statutory aggravating circumstance. The United States Supreme Court decided this was error but stated. ". . .[M]ere errors of state law are not the concern of this court, Gryger v. Burke, 334 U.S. 728, 731, 68 S.Ct. 1256, 1257, 92 L.Ed.2d 1683 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States constitution." Barclay v. Florida at 3428. The Supreme Court analyzed this issue to see if the consideration of the non-statutory aggravating circumstance rose to the level of a constitutional violation. They concluded that it did not.

> "There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. See n. 9, supra, 'What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime.' Zant, supra, at 16 (emphasis in original)."

Barclay v. Florida, supra.

However, the Supreme Court warned that in some cases, the consideration of improper aggravating circumstances will not be deemed "harmless error."

> "The thrust of our decisions on capital punishment has been 'that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Zant v. Stephens, _____U.S.____, 11 (1983),

> quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)"

Trial judges must not be allowed to rely on non-statutory aggravating circumstances that are so arbitrary and improper as to offend the Constitution. As long as the trial judge properly exercises his discretion and the facts indicating the death penalty are "so clear and convincing that virtually no reasonable person could differ," a harmless error analysis can be used. Barclay v. Florida, supra.

The safeguard in employing a harmless error analysis is that:

> ". . . Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' State v. Dixon, 283 So.2d 1, 10 (1973). 428 U.S., at 248-251 (footnotes omitted) (emphasis supplied)."

Barclay v. Florida, supra.

The Barclay case differs from the case at bar in one important respect. In Barclay, the trial judge found no mitigating circumstances while the trial judge in this case found the appellant's age to be a mitigating circumstance.

A case has recently been decided by the United States Eleventh Circuit, which dealt with the same situation that we have in this cause. In Witt v. Wainwright, [No. 81-5750, September 16, 1983] ___F.2d ___(11th Cir. 1983),[4/] the trial

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[4/] The opinion of the Eleventh Circuit in Witt is an excellent discussion and analysis of the recent cases that have dealt with the issue of the consideration of non-statutory aggravating circumstances.

judge relied on two statutory aggravating circumstances, two non-statutory aggravating circumstances and only one mitigating circumstance, i.e., the defendant's age, in making his determination that the defendant should receive the death penalty. The court, in affirming the defendant's sentence of death, relied heavily on a Florida Supreme Court case, Brown v. State, 381 So.2d 690 (Fla. 1980). The Florida Supreme Court in that case stated:

> "Although improper aggravating circumstances (factors enumerated 1 and 2) went into the calculus of the trial judge's sentence decision and there was identified a mitigating circumstance (appellant's age), nevertheless, Elledge v. State, 346 So.2d 998 (Fla. 1977) does not compel a reversal of the sentence judgment in this case. This is so because unlike Elledge, here 'we can know' that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d at 1003.
>
> "The trial judge has told us in his order that the appellant's age, 22 years at the time of the offense and 23 years at the time of the trial, had only 'some minor significance.' When this tenuous factor is juxtaposed against at least two well-founded aggravating circumstances it is beyond reason . . . to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances. This case then is dissimilar to Elledge, but like Hargrave v. State, 366 So.2d 1 (Fla. 1978), where the doubling up of aggravating circumstances was not fatal to the imposition of a death sentence even in light of the existence of two mitigating circumstances. Here, as there, ample other statutory aggravating circumstances exist to convince us that the weighing process has not been compromised."

The conclusion of the court was that,

> "[g]iven the imprecision of the criteria set forth in our capital punishment statute we must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum. Hargrave v. State, supra; State v. Dixon, 283 So.2d 1 (Fla. 1973)."

Brown v. State, supra.

In Witt, the court distinquished another case, Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), in which it was held the "harmless error" rule did not apply.

> "The case at bar differs from Goode in a subtle, yet significant manner. Unlike Goode, the instant case involves the existence of only a single and insubstantial mitigating circumstance, i.e., age.
>
> " . . .
>
> "While there is no doubt that the sentencing judge relied heavily upon the aggravating factor which the state procedures themselves forbid in imposing the death penalty upon Witt, it is not entirely apparent that all other defendants in Florida would have been entitled to resentencing under these circumstances, because of the existence of only a single and insubstantial mitigating circumstance, i.e., age. Consequently, it is also not entirely apparent that the concerns expressed in Goode over arbitrary and freakish executions should be invoked in Witt's case. See Gregg v. Georgia, 428 U.S. 153, 188-89, 96 S.Ct. 2909, 2932, 49 L.Ed. 2d 859 (1976)."

Witt v. Wainwright, supra.

Furthermore, the Eleventh Circuit went on to say that, "we believe Witt's claims are properly encompassed within Barclay's affirmance of Florida's procedures. Indeed, the concurrence in Barclay suggests that the reasoning of that opinion extends to the Florida Supreme Court's handling of the Brown case. See ___U.S. at _____ n. 12, 103 S.Ct. at 3432 n. 12 (Stevens, J., concurring, joined by Powell, J.)."

In light of Witt and Barclay, it is our conclusion that it is proper to apply a "harmless error" analysis to the case at bar. The trial judge only considered one improper aggravating circumstance (the appellant's juvenile record) and the only mitigating circumstance (the appellant's age) was the same as was addressed by the Florida Supreme Court in Brown v. State, supra, and by the Eleventh Circuit in Witt.

Therefore, although the consideration of the non-statutory aggravating circumstance was clearly error, it was harmless

error when viewed in light of the other aggravating circumstances in this case.

From our review of the trial judge's findings of fact, even in the absence of the non-statutory aggravating circumstance, the aggravating circumstances far outweigh the single mitigating circumstance. The trial judge properly exercised his discretion in sentencing this appellant to death. Therefore, a new sentencing hearing is not required in this cause.

V

This court is required by § 13A-5-53(a) Code of Alabama, 1975 to independently review each case in which the sentence of death is imposed to determine.

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> "(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and
>
> "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Alabama Code § 13A-5-53(b), see also Beck v. State, 396 So. 2d 645 (Ala. 1980).

First, we do not believe the trial judge's sentence was imposed under any passion or prejudice or for an arbitrary reason.

Secondly, as we stated in our previous discussion, the statutory aggravating circumstances greatly outweighed the single mitigating circumstance and we do not feel that the trial judge's consideration of the non-statutory aggravating circumstance affected the balance to any significant degree.

Thirdly, the appellant's sentence of death has been imposed in similar cases. See Luke v. State, [Ms. 4 Div. 98, March 1, 1983] ___So.2d____ (Ala.Crim.App.), affirmed, [Ms. 82-622, September 30, 1983] ___So.2d___(Ala. 1983); Ritter v. State,

429 So.2d 928 (Ala. 1983); Womack v. State, 435 So.2d 754 (Ala.Crim.App. 1982), aff'd 435 So.2d 765 (Ala. 1983).

The State of Alabama's application for rehearing is herewith granted. The judgment of reversal by this court dated October 6, 1981 is hereby set aside.

For the reasons stated above, the judgment of conviction and sentence of death are hereby affirmed.

We have carefully again examined this record and find no error therein. Application for rehearing granted. Judgment affirmed.

AFFIRMED.

All the Judges concur.

OPPOSITION BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BRIAN KEITH BALDWIN,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN CONCURRENCE

WITH CERTIORARI PETITION

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QUESTION PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review and resolve the sharp conflict between the Alabama Supreme Court decision below and the decision of the United States Court of Appeals for the Eleventh Circuit in Ritter v. Smith, 726 F.2d 1505, 1513-1517 (1984), concerning the constitutionality of the sentencing procedures in Alabama's 1975 capital punishment statute?

2. What is the nature and extent of the doctrine announced in Goode v. Wainwright, 104 S.Ct. 378, 383 (1983), whereby an alleged error occurring in the capital sentencing process at the trial level can be rendered harmless or innocuous by independent re-weighing of the aggravating and mitigating circumstances on appeal?

PARTIES

The caption contains the names of all the parties.

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OPINIONS BELOW

The statement of "the opinions below" which is contained in the certiorari petition is correct. For the convenience of the Court, the Alabama Supreme Court decision is reproduced as Appendix A hereto, and the Alabama Court of Criminal Appeals decision is reproduced as Appendix B.

JURISDICTION

Respondent does not contest that the certiorari petition was timely filed. This Court has jurisdiction under 28 U.S.C. §1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statement of "constitutional and statutory provisions involved" which is contained in the certiorari petition is correct, except that this case does not involve the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The facts of the crime, as found by the Alabama appellate courts, are as follows:

> The victim of the appellant's vicious crime was a sixteen-year-old girl named Naomi Nolon. On November 25, 1976, she was driving across town in Hudson, North Carolina, to visit her father who was in a local hospital. She was abducted before reaching her destination by the appellant and his companion, Edward Horsley, both of whom were escapees from a North Carolina prison camp at the time. They took control of her automobile and drove to Charlotte, North Carolina, where they attempted to rape her and to choke her to death. They stripped her of all her clothing except her shoes and socks. She was stabbed with a knife in various parts of her body and then locked in the trunk of the automobile she had been driving. Baldwin and Horsley then drove the car through South Carolina to Atlanta, Georgia, where they spent the night. They next drove to Montgomery, Alabama, on Interstate Highway 85 and then proceeded to Camden, Alabama, located in Wilcox County. The victim remained locked in the trunk of the car during the entire trip.
>
> In Camden, the appellant stole a pick-up truck which contained a hatchet. Horsley drove the automobile, and the appellant drove the truck to an isolated spot in Monroe County. There they removed the victim from the trunk of the car, and Horsley attempted to run the car over her. After several unsuccessful attempts to kill the victim with the automobile, the appellant took the hatchet from the trunk and killed her with a blow leaving a gaping wound in the base of her neck. The two killers were later arrested in Lanett, Alabama, where they were traveling in the stolen truck. The automobile tag from the victim's car was found in the truck which appellant was driving. Both were transported to the Wilcox County Jail on the truck theft charge.

Brian Keith Baldwin v. State, No. 1 Div. 901 (Ala.Cr.App. Nov. 1, 1983), slip op. at 2-3, aff'd, Ex parte Brian Keith Baldwin, No. 83-276 (Ala. July 13, 1984); see also, Baldwin v. State, 372 So.2d 32, 33 (Ala. 1979), adopting, Baldwin v. State, 372 So.2d 26, 26-27 (Ala.Cr.App. 1978).

Petitioner Baldwin was indicted for the capital offense of robbery-intentional killing, as defined in Code of Alabama 1975, §13-11-2(a). He was tried, convicted and sentenced to death under the provisions of that 1975 capital punishment statute.

The Alabama Court of Criminal Appeals affirmed petitioner's conviction and sentence in Baldwin v. State, 372 So.2d 26 (Ala.Cr.App. 1978), and the Alabama Supreme Court affirmed that decision in Baldwin v. State, 372 So.2d 32 (Ala. 1979).

In 1980, this Court vacated the Alabama Supreme Court's decision and remanded the case to it for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980). Baldwin v. Alabama, 448 U.S. 903 (1980). The Alabama Supreme Court, in turn, remanded the case to the Court of Criminal Appeals for further consideration in light of Beck. Baldwin v. State, 405 So.2d 698 (Ala. 1981).

Following remandment, the Alabama Court of Criminal Appeals initially reversed petitioner's conviction. Baldwin v. State, 405 So.2d 699 (Ala.Cr.App. 1981). However, thereafter this Court issued its decision in Hopper v. Evans, 456 U.S. 605 (1982), which held that not all pre-Beck v. Alabama, supra, Alabama capital convictions were invalid. The Alabama Court of Criminal Appeals then granted the State's rehearing application, rescinded its prior opinion, and held that petitioner's conviction and sentence were both valid. Brian Keith Baldwin v. State, No. 1 Div. 901 (Ala.Cr. App. Nov. 1, 1983).

On July 13, 1984, the Alabama Supreme Court reviewed and affirmed the Court of Criminal Appeals' decision against petitioner. Ex parte Brian Keith Baldwin, No. 83-276 (Ala. July 13, 1984). In doing so, the Alabama Supreme Court rejected petitioner's argument that the sentencing procedures contained in Alabama's 1975 capital punishment statute were

unconstitutional. In doing so, it specifically considered and rejected the Eleventh Circuit's decision in Ritter v. Smith, 726 F.2d 1505 (11th Cir. 1984). That decision of the Alabama Supreme Court is the subject of the certiorari petition.

HOW THE FEDERAL CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW

The statement in the certiorari petition concerning how the federal constitutional question was raised and decided below is correct.

THE CERTIORARI PETITION SHOULD INDEED BE GRANTED

Respondent wholeheartedly agrees with petitioner that this Court should grant certiorari and after plenary review decide whether the sentencing provisions of Alabama's 1975 capital punishment statute are unconstitutional. Of course, the parties do not agree about the answer this Court should give to the important federal constitutional question involved, but they do agree that it is necessary and proper for this Court to answer that question, one way or the other.

I. THERE IS A CLEAR AND SHARP CONFLICT BETWEEN THE ALABAMA SUPREME COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS ON THE FEDERAL CONSTITUTIONAL QUESTION OF WHETHER ALABAMA'S CAPITAL SENTENCING PROCEDURES ARE CONSTITUTIONAL

The conflict between the Alabama Supreme Court and the United States Court of Appeals for the Eleventh Circuit on the federal constitutional question of whether the sentencing provisions of Alabama's 1975 capital punishment statute are constitutional could not be any clearer. The Alabama Supreme Court addressed the question first. It held in Ritter v.

State, 429 So.2d 928, 935-937 (Ala. 1983), that the sentencing provisions in issue were constitutional. The defendant in that case chose not to seek review of that holding in this Court. Instead, Ritter went directly into federal habeas, and secured the opposite holding from the Eleventh Circuit. Ritter v. Smith, 726 F.2d 1505 (Ala.), cert. denied, 53 U.S.L.W. 3240 (Oct. 1, 1984).

Meanwhile Baldwin, the petitioner here, argued to the Alabama Supreme Court that it should follow the Eleventh Circuit's decision. The Alabama Supreme Court, in the decision which is the subject of the certiorari petition, emphatically refused to do so. Ex parte: Brian Keith Baldwin, No. 83-276 (Ala. July 13, 1984), slip op. at 12-18. The Court acknowledged the Eleventh Circuit's decision in Ritter, but pointed out the flaw in that decision's reasoning. The flaw is the Eleventh Circuit's assumption that the language of the jury verdict form "fixing" each convicted capital defendant's sentence at death is given weight in the trial judge's sentencing decision. Ex parte: Brian Keith Baldwin v. State, supra, slip op. at 13-14. That is simply not so, said the state high court.

The Alabama Supreme Court explained how badly the Eleventh Circuit had misunderstood Alabama law in making the erroneous assumption it had:

> We emphasize that the trial court must conduct a separate sentencing hearing, which is independent of the guilt phase of the proceeding. Section 13-11-4 requires the court to weigh all of the aggravating circumstances against all of the mitigating circumstances, and make its sentencing determination. The court shall either sentence the defendant to death, and necessarily accept the jury's sentence, or sentence the defendant to life imprisonment without parole, and necessarily reject the jury sentence.
>
> We hold that the sentencing procedure under the 1975 Death Penalty Act is constitutional, even though the jury has no discretion in sentencing. The statute is saved by the fact that the court, which

> is the sentencing authority, considers the circumstances of the particular offense and the character and propensities of the offender, i.e., the aggravating and mitigating circumstances, in a separate and independent sentencing hearing, and then imposes the sentence.

Ex parte: Brian Keith Baldwin v. State, supra, at 15-17. With that explanation, the Alabama Supreme Court rejected the Eleventh Circuit's Ritter decision and reiterated its own holding from the Ritter direct appeal.

This is precisely the type of situation Rule 17.1(b) of this Court was meant to cover. A state court of last resort has decided a federal question in a way in conflict with the decision of a federal court of appeals. The conflict here is aggravated by two facts. One is that the state court of last resort decided the question first, then the federal appeals court decided the same question differently, and now the state court has sharply refused to alter its holding.

The second fact which aggravates the conflict is that there are at least nine pre-Beck v. Alabama, supra, death sentence cases which involve this same federal constitutional question. If the dispute between the Eleventh Circuit and the Alabama Supreme Court is not resolved by this Court, the Alabama Supreme Court will continue to adhere to its position, affirming those death sentences, and the Eleventh Circuit or the federal district courts obedient to its decisions will continue to set aside the judgments affirmed by the Alabama Supreme Court. The resulting friction will damage federal-state relations and inter-jurisdictional harmony.

Neither the Eleventh Circuit nor the Alabama Supreme Court considers itself bound by the other's decisions. However, both recognize that they are bound by this Court's decisions. Therefore, only a decision by this Court can settle the dispute and prevent unnecessary friction between the Eleventh Circuit and the Alabama Supreme Court. This

Court should grant certiorari in order to provide such a decision. If it does, the parties disagree about what the ultimate holding should be. But they do agree there should be a decision on the merits by this Court.

II. ANOTHER IMPORTANT FEDERAL CONSTITUTIONAL ISSUE IS ALSO PRESENTED

In addition to the question of whether Alabama's 1975 statutory capital sentencing procedure is constitutional, this case also presents another important federal constitutional issue. In Wainwright v. Goode, 104 S.Ct. 378 (1983), this Court held that errors which infect and taint a trial judge's sentencing decision can be rendered innocuous by independent appellate review of the death sentence decision. The Goode case involved the aggravating circumstance of future dangerousness, which was improperly found and considered under state law. In rejecting the claim that that error made the sentencing process arbitrary and the result unconstitutional, this Court said:

> On direct appeal to the Florida Supreme Court, the court stated that "comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence." Goode v. State, 365 So.2d 381, 384-385 (1978). Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent re-weighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's further dangerousness. Consequently, there is no sound basis for concluding that the procedures followed by the state produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

104 S.Ct. at 383 (emphasis added).

Thus, the second important constitutional issue presented by this case is the nature and extent to which independent review of the sentencing decision in a capital

case by the state appellate courts can render innocuous any arguably erroneous errors in the sentencing process at the trial court level. Both Alabama appellate courts independently weighed the aggravating and mitigating circumstances and determined that death was the proper sentence in this case.

When it did so, the Court of Criminal Appeals said:

> This court is required by § 13A-5-53(a) Code of Alabama, 1975 to independently review each case in which the sentence of death is imposed to determine.
>
> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> "(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and
>
> "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Alabama Code § 13A-5-6(b), see also Beck v. State, 396 So.2d 645 (Ala. 1980).

First, we do not believe the trial judge's sentence was imposed under any passion or prejudice or for an arbitrary reason.

Secondly, as we stated in our previous discussion, the statutory aggravating circumstances greatly outweighed the single mitigating circumstance and we do not feel that the trial judge's consideration of the non-statutory aggravating circumstance affected the balance to any significant degree.

Thirdly, the appellant's sentence of death has been imposed in similar cases. See Luke v. State, [Ms. 4 Div. 98, March 1, 1983] ___ So.2d ___ (Ala.Crim.App.), affirmed, [Ms. 82-622, September 30, 1983] ___ So.2d ___ (Ala. 1983); Ritter v. State, 429 So.2d 928 (Ala. 1983); Womack v. State, 435 So.2d 754 (Ala.Crim. App. 1982), aff'd 435 So.2d 766 (Ala. 1983).

Brian Keith Baldwin v. State, No. 1 Div. 901 (Ala.Cr.App. Nov. 1, 1983) (emphasis added).[1]

Moreover, the Alabama Supreme Court also independently reweighed the aggravating and mitigating circumstances and reached the same conclusion as the lower appellate court had. The Alabama Supreme Court said:

> The sentence of death was not imposed in an arbitrary or capricious manner, nor was it handed down under the influence of passion or prejudice. The sentence was appropriate, as the aggravating circumstances greatly outweighed the mitigating circumstances. We take judicial notice that other defendants convicted of this offense have also received sentences of death. Most notably, Edward Horsley, petitioner's accomplice, has been sentenced to death. Horsley v. State, [MS. November 29, 1983] ___ So.2d ___ (Ala. Crim.App. 1983).

Ex parte: Brian Keith Baldwin v. State, No. 83-276 (Ala. July 13, 1984), slip op. at 19 (emphasis added).

Thus, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court independently weighed the aggravating and mitigating circumstances in this case and found that death is the appropriate sentence. Under the reasoning of this Court's decision in Wainwright v. Goode, 104 S.Ct. 378 (1983), and borrowing its words for this case:

> Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent re-weighing of the aggravating and mitigating circumstances the [Alabama appellate courts] considered [the jury's mandatory verdict form language fixing the penalty at death]. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

Id., at 383. In reaching its contrary decision, the Eleventh

---

[1] Code of Alabama 1975, §13A-5-53(a) is part of the 1981 capital punishment statute, which technically applies only to cases arising after July 1, 1981. However, out of a sense of leniency, the Alabama appellate courts have consistently applied that statutorily mandated type of appellate review of death sentences to cases which arose before 1981, as this one did.

Circuit Court of Appeals in Smith v. Ritter, supra, completely ignored the independent appellate review of death sentences, a constitutionally significant feature of Alabama's capital punishment statute. See, e.g., Barclay v. Florida, 103 S.Ct. 3418, 3428 (1983).

Therefore, the present case presents an ideal vehicle for considering the reach of this Court's decision in Goode v. Wainwright, supra, concerning the effect of independent appellate review of capital sentencing on any alleged errors which occurred during the trial court's sentencing process. This Court should take advantage of this opportunity to expound on the law in this important area.

III. THE DENIAL OF CERTIORARI IN SMITH v. RITTER DOES NOT PRECLUDE CERTIORARI IN THIS CASE

On October 1, 1984, this Court denied the State certiorari petition in Smith v. Ritter, No. 83-1875. That action does not preclude the granting of certiorari in this case, for several reasons. First, it is beyond dispute that a denial of certiorari does not amount to an adjudication on the merits and does not preclude review being granted on the same question later. E.g., Hawthorn v. Lovorn, 457 U.S. 255, 262 n. 11 (1982); Hughes Tool Company v. Trans World Airlines, 409 U.S. 363, 366 n. 1 (1973); Polites v. United States, 364 U.S. 426, 433 n. 9 (1960); Brown v. Allen, 344 U.S. 443, 492 (1953) (opinion of Frankfurter, J.).

Secondly, while the first question presented in this case was also presented in the State's certiorari petition in Ritter, the question is more clearly presented here. It is more clearly presented here because Ritter was a §2254 proceeding and inextricably wound up with this question in the Ritter case were other questions such as the scope of federal habeas review, etcetera. The first question

presented here was only one of four questions presented in Ritter, and those other questions presented in Ritter clouded the picture there. Indeed, the State's certiorari petition in Ritter itself stressed that it was not necessary for this Court to decide the constitutionality of Alabama's 1975 statutory capital sentencing procedures in order to dispose of that case on the merits. Smith v. Ritter, No. 83-1875, Cert. Pet. at 59-60. On the other hand, that question is a threshold one in this direct appeal case. It is more clearly, and more inescapably, presented here.

The third reason this Court should grant certiorari here even though it denied certiorari in Ritter is that the second question presented in this case — the nature and scope of the Goode doctrine — was not put forward as a question presented for review in Ritter. Smith v. Ritter, supra, Cert. Pet. at i - ii.

Fourth, the granting of certiorari in this case will not lead to any inconsistency in the actual results of the Ritter case and this case. The Eleventh Circuit has issued its mandate in Ritter, but the federal district court has not yet issued an order requiring the State to give Ritter a new sentencing trial. Such orders usually allow the State six months to take the required action. Therefore, we are at least six months away from the State being compelled to take action which might be inconsistent with any decision by this Court on the present certiorari petition. If this Court grants certiorari in this case in the meantime, a stay of the Ritter resentencing trial can and will be obtained from the lower federal courts.

Of course, the State as respondent here does not know why this Court denied certiorari in Smith v. Ritter,

supra. However, unless the denial of certiorari was for the upmost compelling reasons related to the merits, the State of Alabama and the people it represents urge this Court to reconsider the matter insofar as it involves the first question presented in this present case, which was the fourth question presented in Ritter. As busy as this Court is and as pressed as it is by the demands of other certiorari petitions clamoring for review, the State of Alabama and its people join petitioner in asking this Court to find time to rule on the merits of the two important federal constitutional questions presented here.

Unless this Court reviews the matter, a federal district court bound by the Eleventh Circuit's decision in Ritter will eventually order a new sentence trial for petitioner. A new sentence trial will necessitate the retrial of most of the evidence in this case before a new jury and a trial judge, and then a whole new set of direct appeals will follow.

It has already been eight years since petitioner escaped from a North Carolina prison and kidnapped sixteen-year-old Naomi Rolon while she was on the way to visit her father in a local hospital. It has been eight years since petitioner brutalized, abused, and tortured the young girl while he hauled her across several states. It has been eight years since petitioner hacked her to death with a hatchet in rural Monroe County, Alabama. If the Constitution requires that virtually the entire legal process in this case begin anew and that years of delay be added to this already much delayed case, then so be it. However, unless this Court grants review of this case, and uses it as a vehicle to review the conflict between the Eleventh Circuit and the Alabama Supreme Court, the parties will never know whether the Constitution in fact requires such a drastic result.

Only this Court can determine whether it is the Eleventh Circuit or the Alabama Supreme Court which is correct on the

matter. Only this Court can determine whether the Constitution does in fact require the State to begin anew its effort to impose upon petitioner the punishment which he so richly deserves. Petitioner is correct about one thing. This Court should indeed grant certiorari. It should decide the matter on its merits.

CONCLUSION

This Court should grant certiorari and set the matter down for briefing on the merits and oral argument.

Respectfully submitted,

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ALABAMA ATTORNEY GENERAL
BY-

Edward Carnes

EDWARD E. CARNES
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CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Supreme Court Bar, certify that I did serve a copy of this petition and the attached appendices on petitioner, by placing a copy in the United States Mail, postage prepaid, and properly addressed to his counsel, as follows:

Hon. Roger C. Appell
Suite 824-833
Brown-Marx Towers
2000 1st Avenue North
Birmingham, Alabama 35203

I further certify that I have served all parties required to be served.

Done this the 24th day of November, 1984.

Edward Carnes

EDWARD E. CARNES
ASSISTANT ALABAMA ATTORNEY GENERAL

JOINT

APPENDIX

Office-Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-5743

In the Supreme Court of the United States

OCTOBER TERM, 1984

BRIAN KEITH BALDWIN, PETITIONER,

v.

STATE OF ALABAMA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED
OCTOBER 23, 1984
CERTIORARI GRANTED DECEMBER 10, 1984

In the Supreme Court of the United States

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CHRONOLOGICAL LIST OF RELEVANT EVENTS

April 20, 1977 – Petitioner indicted under the Alabama Capital Murder Statute in existence at that time.

August 9, 1977 – Petitioner is found guilty and sentenced to death by his trial jury.

September 9, 1977 – Petitioner is sentenced to death by the trial judge.

October 3, 1978 – Petitioner's conviction and death sentence is affirmed by the Alabama Court of Criminal Appeals.

June 1, 1979 – The Alabama Supreme Court affirms the Court of Criminal Appeals decision upholding petitioner's conviction and death sentence.

June 30, 1980 – The United States Supreme Court vacates the decision of the Alabama Supreme Court and remands the case.

August 28, 1981 – The Alabama Supreme Court remands the case to the Court of Criminal Appeals.

October 6, 1981 – The Alabama Court of Criminal Appeals reverses petitioner's conviction.

November 1, 1983 – The Court of Criminal Appeals rescinds its opinon of October 6, 1981 and reinstates petitioner's conviction and death sentence.

July 13, 1984 – The Alabama Supreme Court affirms the decision of the Court of Criminal Appeals reinstating petitioner's conviction and death sentence.

COPY OF INDICTMENT

THE STATE OF ALABAMA
MONROE COUNTY

No. 81 Circuit Court,
Spring Term, 1977

The Grand Jury of said County charge that, before the finding of this Indictment Brian Keith Baldwin and Edward Horsley, whose names are to the Grand Jury otherwise unknown, feloniously took one 1970 Chevrolet automobile of the value of, to-wit: $400.00, and one set of keys of the value of, to-wit: $1.00, being of the total and combined value of, to-wit: $401.00, the property of Naomi Rolon, from her person, and against her will, by violence to her person, or by putting her in such fear as unwillingly to part with the same, and said Brian Keith Baldwin and Edward Horsley, whose names are to the Grand Jury otherwise unknown, in the course of the aforesaid robbery, did intentionally kill the said Naomi Rolon by cutting her with a hatchet or other heavy cutting instrument, a further description of which is unknown to the Grand Jury, and that said offense took place subsequent to March 7, 1977, against the peace and dignity of the State of Alabama.

THEODORE B. PEARSON, JR.
D.A. of the 35th Judicial Circuit.

A True Bill Charles Lambert, Foreman Grand Jury.
Filed in open Court on the 20th day of April, 1977, in the presence of the Grand Jury.

JOHN M. SAWYER, Clerk.

Presented to the Presiding Judge in open Court by the Foreman of the Grand Jury, in the presence of 17 other Grand Jurors, and filed by order of Court this 20th day of April, 1977.

JOHN M. SAWYER, Clerk.

THE STATE OF ALABAMA, MONROE COUNTY,

I, John M. Sawyer, Clerk of the Circuit Court in and for said County, in said State, do hereby certify that the within is a true and correct copy of the indictment in the case of the State of Alabama vs. Edward Horsley, charged with Robbery with the Aggravated Circumstance of Intentionally Killing the Victim. as the same appears from the files and records in my office.

Witness my hand, this 8th day of July, 1977.

JOHN M. SAWYER
Clerk of the Circuit Court.

IN THE
CIRCUIT COURT OF MONROE COUNTY, ALABAMA
CASE NO. CC-77-51

STATE OF ALABAMA

vs.

BRIAN KEITH BALDWIN, DEFENDANT

VERDICT

We, the Jury, find the defendant guilty as charged in the indictment, and fix his punishment at death by electrocution.

William H. Bowl
Foreman

Filed
Aug. 9, 1977,
John M. Sawyer,
Clerk of Court

IN THE
CIRCUIT COURT OF MONROE COUNTY, ALABAMA
CASE NO. CC-77-51

STATE OF ALABAMA, PLAINTIFF

vs.

BRIAN KEITH BALDWIN, DEFENDANT

ORDER

In this case, the jury, on August 9, 1977, having found the defendant guilty as charged in the indictment and fixed his punishment at death by electrocution, in accordance with Section 342(5) of Title 15 of the 1940 Code of Alabama, as amended, it is hereby Ordered that September 9, 1977, is hereby set as the day on which the Court will hold a hearing to aid in the determination of whether or not the Court will sentence the defendant to death or to life imprisonment without parole.

It is further Ordered that the defendant and his counsel and counsel for the State of Alabama be notified of this Order.

Done at Monroeville, Alabama, on this the 16th day of August, 1977.

D. E. Finley
Circuit Judge

Filed
Aug. 22, 1977,
John M. Sawyer,
Clerk of Court

TRANSCRIPT OF SENTENCING HEARING HELD ON SEPTEMBER 9, 1977

THE COURT: Mr. Sheriff, bring Brian Keith Baldwin in, please.

(Whereupon, the defendant, Brian Keith Baldwin, was brought into the courtroom.)

THE COURT: Let the record show this is the case of the State of Alabama versus Brian Keith Baldwin, there being present the State of Alabama represented by Mr. Theodore B. Pearson, Jr., District Attorney, and Mr. Bob Morrow, District Attorney of the Fourth Judicial Circuit, and the defendant being present in his own proper person represented by his counsel of record, Mr. Windell C. Owens and Mr. Paul M. Harden. The purpose of this hearing, of course, is to determine whether or not the Court will sentence Brian Keith Baldwin to death or to life imprisonment without parole.

Mr. Pearson, do you have anything which relates to aggravating circumstances as prescribed by the statute?

MR. PEARSON: Yes, sir, Judge, we have. Mr. Morrow has a couple of exhibits he would like to introduce into the evidence.

THE COURT: Mr. Owens, have you all had a chance to see those?

MR. OWENS: Yes, sir, I've read it.

MR. MORROW: The State would offer as State's Exhibit A, Your Honor, the statement of the co-defendant, Edward Horsley.

THE COURT: Let it go in.

(Whereupon, State's Exhibit A, statement of Edward Horsley, was admitted into evidence.)

MR. MORROW: We would offer State's Exhibit B, being the juvenile record of Brian Keith Baldwin reflecting his adjudication and delinquency based on a charge of assault with intent to rape.

THE COURT: Let it go in.

(Whereupon, State's Exhibit B, juvenile record of Brian Keith Baldwin, was admitted into evidence.)

MR. MORROW: We would offer State's Exhibit C, the adult record of Brian Keith Baldwin, reflecting a conviction for common law robbery and a sentence to the penitentiary and a conviction for the possession of Marihuana.

THE COURT: Let it go in.

(Whereupon, State's Exhibit C, adult record of Brian Keith Baldwin, was admitted into evidence.)

THE COURT: Do you have anything further, Mr. Morrow and Mr. Pearson, to offer in regard to the aggravating circumstances?

MR. MORROW: Your Honor, we point out to the Court the facts of aggravation from the evidence.

THE COURT: Mr. Morrow, I'll give you an opportunity to argue the matter in just a few minutes. Do you have any other evidence?

MR. MORROW: That's all the evidence we want to introduce.

THE COURT: Mr. Owens, do you have any mitigating circumstances which you would like to offer to the Court at this time?

MR. OWENS: Judge, I think perhaps I ought to in view of the gravity of the situation – put the defendant on the stand and see if I can elicit any mitigating facts from him. I don't have any particular thing in mind but I think perhaps I ought to give him an opportunity to give any circumstances that might be of any benefit to him and I think that the only way to do that is just put him on the stand.

THE COURT: Brian Keith Baldwin, you have the right now to take the stand and testify in your own behalf as to mitigating circumstances. Now is your opportunity to come forward and be heard if you so choose.

MR. OWENS: Judge, he is going to take the stand.

BRIAN KEITH BALDWIN

The defendant, after having been first duly sworn to speak the truth, the whole truth and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. OWENS:

Q This is Brian Keith Baldwin, is it not? Is that your name?
A Yes, sir.
Q Brian, how old are you?
A Nineteen.
Q When were you nineteen?
A July 16th.
Q Where were you born?
A Charlotte, North Carolina.
Q What is your father's name?
A James Baldwin.
Q Is your father and mother both still living?
A Yes, sir.
Q How long has it been since you lived in your father and mother's home? How many years?
A You mean . . .
Q About how old were you when you left home?
A I was thirteen.
Q Thirteen years old?
A Yes, sir.
Q Any particular reason that you left home?
A Just me and my father couldn't get along.
Q Just you and your father couldn't get along?
A No, sir.
Q And you left home at thirteen. What did you do? How did you live?
A Stayed in a hotel.
Q How did you make a living?
A Street hustling.
Q Hustling on the street?
A Yes, sir.
Q Did you continue to go to school?
A Yes, sir.
Q Did you make any more grades after you got out on your own at thirteen years old?
A Yes, sir.

Q How many grades did you make after that time?
A I finished the eighth and ninth.
Q Finished the eighth and ninth.
A Yes, sir.
Q Did you leave school at the end of the ninth grade?
A No, sir.
Q How much more schooling did you have?
A I had about two more months and was terminated.
Q During that time, you were scrounging a living for yourself – is that right?
A Yes, sir.
Q Do you have any brothers and sisters?
A Yes, sir.
Q How many brothers do you have?
A Three.
Q What are they doing at this time?
A The two oldest ones are serving twenty-five and thirty.
Q And did the other one just get out of the pen?
A Yes, sir.
Q How many sisters do you have?
A One.
Q What is she doing?
A I don't know.
Q How long has it been since you have seen her?
A Seventy-one.
Q Do you know where she lives?
A The last I heard from her, she was living in Texas.
Q How long has it been since any of your people came to see you, wherever you might have been?
A I ain't seen them before about since '74.
Q Since '74?
A Yes, sir.
Q Have you been in prison somewhere continuously since that time or did you not see them for a good long time before you went to prison?
A I seen them the night before the police arrested me.
Q The night before the police up there arrested you on the charge that you were serving time for up there – is that correct?

A Yes, sir.
Q Did they come to your hearing up there – your trial?
A No, sir.
Q Did they ever visit you up there at Hudson Prison?
A No, sir.
Q Have any of your family ever visited you down here?
A No, sir.
Q When did you start serving the prison term up there from where you escaped?
A From Hudson?
Q Yes. How long had you been there when you escaped?
A About three months.
Q About three months?
A Yes, sir.
Q How much time did you have there?
A Five years.
Q How many times have you been arrested that you know of since you left home? Just give me an estimate if you can recall.
A About thirty.
Q About how many?
A Thirty.
Q Is there anything else that you would like to tell the Court here? You understand the situation and the purpose of this hearing, do you not, to see whether the Court will see anything to either give you – to commute your sentence to life imprisonment or to let the sentence of the jury stand. Is there anything that you would like to tell the Court that might help you in some way at this point? If there is, now is the time to do it.
A I was an addict while I was in prison.
Q After you and the other young fellow escaped, did you get hold of some drugs?
A Yes, sir.
Q Whereabouts did you get them?
A Atlanta, Georgia.
Q Did you all take them?
A We ran some T.H.C.
Q What is T.H.C.?

A Chemicals – just pills – chemicals.
Q You ran them – do you mean you swallowed them – took them by mouth?
A We injected them.
Q Is there anything else you would like for the judge to know or to be able to tell him at this point?
A You mean when I started?
Q Is there anything that you think might help you? Is there anything else that you would like to tell the Court here that you think might be of some assistance to you or that he might consider in setting your penalty?
A Well, I had a hard time growing up.
Q You left home at thirteen. What kind of work did your father do?
A He was a truck driver.
Q Has he ever been in jail or anything?
A No, sir.
Q How about your mother?
A No, sir.
Q And your father was not a dope addict, was he?
A No, sir.
Q Well, was your father a real strict father in that he required you to mind him if you stayed at home?
A You know – like if I come in late, me and him would get in an argument.
Q You are talking about late. You mean way up in the night or something like that?
A No. Like when I was in about the seventh grade, he wanted me to come home around eight.
Q In the evening?
A Yes, sir.
Q Did you ever try to help him around his house or anything like that?
A Yes, sir.
Q Have you ever held a steady job doing any kind of work?
A A man gave me a job at a carpenter shop and I kept the job two days and I got off from work and the police picked me up and took me to jail.
Q What did they do that for?
A They said they seen me in a stolen car. They took me off the bus, the city coach bus; I went to court for it and they

couldn't prove it, so they let me back out. I went to go back to work and the boss man told me I couldn't have the job back.

Q Is that the only regular job you ever had?

A I had a job at Super Times.

Q What were your duties there?

A Sticking glasses on a machine – you know – washing them out.

Q How long did you keep that job?

A About three weeks.

Q What happened to you on it?

A He grabbed me.

Q What?

A He grabbed me from behind.

Q Who grabbed you?

A My boss man.

Q What did he do to you?

A I was washing dishes and he came and grabbed me by the collar and the seat of my pants and me and him got in a fight.

Q You and him got in a fight?

A Yes, sir.

Q MR. OWENS: I can't think of anything else, Your Honor, unless the defendant has some other particular things that he wants to tell the Court. I don't think of anything – any particular point I need to try to make.

THE COURT: Brian Keith Baldwin, today is the day you have in court to tell this judge whatever is on your mind and as Mr. Owens has told you, now is your time to tell the judge anything that you feel like might be helpful to you in the position that you find yourself in. I want to give you every opportunity in the world that I know about.

MR. BALDWIN: You mean problems in growing up and stuff?

THE COURT: Anything you feel like you can tell this Judge that will help you in your present position.

A I would get accused for a lot of stuff I hadn't done – you know – accused for different things at school. I got in a lot of fights in school and I would get suspended every time for five and three days. The principal didn't ask me no questions, he would just suspended me. Then one day I got in a fight and the principal suspended me. The boy was holding some

money and he wouldn't make the boy pay me the money. You know – I was just selling dope and stuff trying to make it.

THE COURT: Do you have anything else to say?

A You mean about the trial?

THE COURT: Yes, about the trial or anything else. Today is the day for you to say what you want to say.

A Yes, sir, I've got something to say about the trial. The only thing – my trial wasn't right – you know – the two witnesses I had from the Camden jail, they said the reason they didn't testify was because the sheriff over there threatened them. One of them is in jail now for murder and he said he was scared that if he told the truth on the stand, they was gone convict him for murder which he didn't do, so that is why he said he didn't tell what happened to me over there. That's what he said. Sheriff Moody Maness, he cut my hair while I was over there. He had me tied up and cut my hair with a pocket knife while I was in there. He didn't say nothing about that while I was in there. The rest of them – everybody said they ain't seen me get beat up. They seen me get beat up – they just didn't tell it – all of them know each other is what they said. The D.A. called me a savage in my trial and I ain't said nothing about that – why he called me a savage or nothing. The people thought the case was funny – on the jury – laughing – on the jury – the man sitting on the jury right there (indicating), he was just smiling when the D.A. was calling me a savage – you know. I ain't saying I'm guilty but I might be guilty for murder but I ain't guilty for robbery down here. That's all I got to say.

MR. OWENS: Brian, have you ever had any serious illnesses or either injuries? Were you sick a lot when you were a kid?

A I got in a accident. I was in the back of a truck and I got in a accident and went to the hospital and told the doctor my back was hurting and he said nothing was wrong.

MR. OWENS: I'm talking about injuries that might have affected the way you think – your mind?

A I told him and told him.

MR. OWENS: Told him what?

A About my back and he said you ain't . . .

MR. OWENS: You were thrown out of a truck?
A I didn't get – it was a hand truck – you know.
MR. OWENS: You hurt your back picking up a hand truck?
A No, it was a head-on collission – a head-on.
MR. OWENS: And you were in the back of the truck?
A I was in the back of the truck – it was a closed in truck.
MR. OWENS: Were you hospitalized?
A They hospitalized everybody else.
MR. OWENS: But you?
A They sent me home.
MR. OWENS: How old were you then?
A I was about ten years old. I was in the fifth grade.
MR. OWENS: Can you think of any other, either injuries that you had, or serious illnesses that you might have had as a child?
A You mean – I had headaches and I told them I had headaches and my mom would say – you know – I was playing. Everybody else got some money out of it but I didn't.
MR. OWENS: You are talking about that wreck you had?
A Yes, sir.
MR. OWENS: I have no further questions.
THE COURT: All right. Go down.
THE COURT: Mr. Owens, I know that you are careful, that you are diligent and that you are conscientious and I know that you have had any number of interviews with this client that you were appointed to represent.
Do you have anything else that you might be able to offer in the way of mitigating circumstances?
MR. OWENS: No, sir, Your Honor, I'm sorry to say that I can't think of any other matter. I've gone over this particular hearing with the defendant at length and have been absolutely unable to dig into his background much through his family because I haven't – I've made several attempts to contact them and they, for some reason, have not seen fit to even answer a letter or to return a call and I've had no way of delving too deeply into his background other than what he himself tells me. Based on those interviews, his age and what he has told from the witness stand are the only mitigating circumstances that I have been able to dig up, Your Honor.

THE COURT: Let me ask the defendant this question, Mr. Owens: What is your birthdate?
A July 16th.
THE COURT: What year were you born?
A 1958.
THE COURT: 1958 – July 16th, 1958?
A Yes, sir.
THE COURT: You are nineteen years of age now at the present time?
A Yes, sir.
THE COURT: But when you were charged with this, you were eighteen years of age?
A Yes, sir.
THE COURT: Mr. Pearson, Mr. Morrow, Mr. Owens or Mr. Harden, do you all want to argue this matter any?
MR. OWENS: If it please the Court, I've put on about what argument I have.
THE COURT: The State has the right to open and close the argument.
MR. PEARSON: Judge, I'm going to let Mr. Morrow point out a few aggravating circumstances.
THE COURT: All right, Mr. Morrow, I'll hear from you.
MR. MORROW: Your Honor, Section 6 of the death penalty statute in Section A, points out the defendant was under sentence for common law robbery and had escaped from that sentence at the time this crime was committed. That is one of the aggravating circumstances listed in the law. Under Section B of Section 6, he had been previously convicted of a felony involving violence. That would be the robbery which is stated in the record – of purse snatching – in taking a purse from the person of someone – and adjudged delinquent on a charge of assault with intent to rape which involves violence. Section D, the capital felony was committed while the defendant was in flight and we believe it is fair inference from the evidence that the robbery was committed during this time, a rape was committed during this time and assault with intent to murder was committed during this time in that the defendant's own statement said they ran over the girl with the car and tried to choke her to death.

Section E of Section 6, this capital felony was committed in order to prevent arrest by their statement and by the statement of Edward Horsley which is in evidence, I think you will find that they said they did it so they wouldn't be caught – the reason they killed the girl was so they wouldn't be caught, so they wouldn't leave a witness.

I want to point out the crime was particularly repugnant in our society in that it was committed against a sixteen year old child – not a grown person – that was held captive for over forty hours. There was no evidence put on by the defendant that there was any concern for her pain and suffering while she was in that car those forty hours – naked, stabbed and run over – in the back of that car. There is no evidence they gave her any food or drink during that period of time while they fed themselves with the money they stole from her and now we find that they acquired some drugs and I must presume it was with the money they stole from the victim. The only remark that I know the defendant made which was in Mr. Horsley's statement, at the time he struck the fatal blow was "move your hand so I can get this over with." He didn't get any money out of that either.

THE COURT: All right, Mr. Harden.

MR. HARDEN: Judge, I just want to ask the Court to place this man in the penitentiary for the rest of his life and not send him to the electric chair based on his age at the time he was arrested and also on the hard life that he obviously lived – he had been arrested thirty times prior to the time he was arrested for what he had been convicted of in Alabama. I respectfully ask the Court to place him in the penitentiary for life.

MR. OWENS: This is a conviction for operating a motor vehicle without a license.

MR. BALDWIN: On these, they say I pleaded guilty. Yeah, I pleaded guilty. They had a bank robbery charge . . .

MR. OWENS: On you?

MR. BALDWIN: Yeah, and they told me if I pleaded guilty to these here, they would drop the bank robbery charge. You see – the bank robbery happened out of town and I was in school – I wasn't supposed to be to school but I was down

there – you know – they had a lot of witnesses saying I was down at the school that day. The F.B.I. told me if I didn't plead guilty to all these here and take five years for them – you know – the time I was doing – he said they would forget about the bank robbery but they didn't.

MR. OWENS: Anything else on this other one?

MR. BALDWIN: Yeah, all of them in there together.

MR. OWENS: In other words, you told . . .

THE COURT: Excuse me, Mr. Owens. I was under the impression that the five year common law robbery was for purse snatching.

MR. OWENS: Judge, the record indicates he was given five years on that charge and two years on a charge of – apparently, trying to escape from the police. The charge is operating a vehicle on a public street in the state of North Carolina and speeding in excess of one hundred miles per hour and, of course, he was given not more than two years on that.

THE COURT: That was to run concurrently with the sentence for the common law robbery.

THE COURT: My point was that the common law robbery didn't have anything to do with the bank robbery.

MR. OWENS: No, sir. I think that was a completely different animal, judge.

THE COURT: All right. We will stand in about a fifteen minute recess, please.

(Whereupon, the court went into recess at 3:05 P.M. for fifteen minutes.)

AT 3:30 P.M., THE FOLLOWING OCCURRED:

THE COURT: Let's have order.

Brian Keith Baldwin, stand up. The State of Alabama versus Brian Keith Baldwin, Defendant, in the Circuit Court of Monroe County, Alabama, Case No. CC-77-51: The Court having conducted a hearing pursuant to Title 15, Section 342(6) of the 1940 Code of Alabama as amended to determine whether or not the Court would sentence Brian Keith Baldwin to death or to life imprisonment without parole and the Court having considered the evidence presented at the

trial and at said sentence hearing, the Court makes the following findings of fact: The Court first considered the aggravating circumstances as set out in Title 15, Section 342(8) of the 1940 Code of Alabama as amended:

(a) The Court finds that the capital felony of robbery in the course of which the victim was intentionally killed was committed by the defendant while he was under sentence of imprisonment in the state of North Carolina but from which he had escaped.

(b) The Court further finds that the defendant had previously plead guilty to a felony in the state of North Carolina involving the use of violence to the person of the victim and was sentenced to five years imprisonment in a North Carolina penitentiary as a youthful offender.

(c) The Court further finds that the defendant was previously charged in the state of North Carolina of the offense of kidnapping and rape, which said offenses were disposed of in juvenile proceedings by the defendant being adjudged delinquent by reason of the charge of assault to commit rape.

(d) The Court further finds that the capital felony was committed while the defendant was in the commission of robbery or flight after committing said crime of robbery.

(e) The Court further finds that under the circumstances of this case as revealed by the record, the capital felony was especially heinous or atrocious or cruel.

The Court now considers mitigating circumstances as described in Title 15, Section 342(9) of the 1940 Code of Alabama as amended:

(a) The Court finds the only mitigating circumstances would be the age of the defendant at the time of the commission of the crime, to-wit, eighteen.

The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances, it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the jury should be and is hereby accepted.

It is therefore Considered and Adjudged by the Court that Brian Keith Baldwin is guilty of the capital felony charged in the indictment and specifically of intentionally killing Naomi

Rolon during the robbery or attempt thereof of said Naomi Rolon, deceased.

It is therefore Ordered and Adjudged that you, Brian Keith Baldwin, suffer death by electrocution at any time before the hour of sunrise on the 9th day of December, 1977, inside the walls of the William C. Holman Unit of the Prison System at Atmore, Alabama, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

It is therefore Ordered and Adjudged by the Court that the Warden of the William C. Holman Unit of the Prison System of Atmore, or in case of his death, disability or absence, his deputy, or in the event of the death, disability or absence of both the Warden and his deputy, the person appointed by the Commissioner of Corrections, at any time before the hour of sunrise on the 9th day of December, 1977, inside the walls of the William C. Holman Unit of the Prison System of Atmore in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of the said Brian Keith Baldwin a current of electricity of sufficient intensity to cause the death and the continuance of the application of said current through the body of said Brian Keith Baldwin until said Brian Keith Baldwin be dead.

May God have mercy on your soul.

There will be an automatic appeal on behalf of the defendant.

Mr. Sheriff, the prisoner will be transported to the custody of the Holman Unit at Atmore.

MR. SHERIFF: Yes, sir.

THE COURT: Court is adjourned.

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1983-84

1 Div. 901

BRIAN KEITH BALDWIN

v.

STATE OF ALABAMA

APPEAL FROM MONROE CIRCUIT COURT

TYSON, JUDGE

Brian Keith Baldwin was indicted for the capital offense of robbery when the victim is intentionally killed by the defendant. At trial, the jury found the appellant "guilty as charged in the indictment." The trial judge, after weighing the aggravating and mitigating circumstances in this case, fixed the appellant's punishment at death by electrocution. See Appendix A, hereto attached and made a part hereof.

The appellant's conviction was originally affirmed by this court in *Baldwin v. State*, 372 So.2d 26 (Ala.Crim.App.1978) and by the Alabama Supreme Court at 372 So.2d 32 (Ala. 1979). The United States Supreme Court vacated the judgment and remanded the case for further consideration in light of *Beck v. Alabama*,[1] 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). Thereafter, the Alabama Supreme Court remanded the case to this court for further consideration and we reversed and remanded on authority of *Beck*. The State has requested a rehearing and for the reasons set forth below, we once again affirm this appellant's judgment of conviction and sentence of death.

The facts of this case as set out in this court's original opinion and quoted by the Alabama Supreme Court, are as follows:

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[1]In *Beck*, the United States Supreme Court invalidated the preclusion clause in Alabama's death penalty statute because the jury was forbidden to consider any lesser included offenses. This clause was in effect at the time the appellant was tried and convicted.

"The victim of the appellant's vicious crime was a sixteen-year-old girl named Naomi Rolon. On November 25, 1976, she was driving across town in Hudson, North Carolina, to visit her father who was in a local hospital. She was abducted before reaching her destination by the appellant and his companion, Edward Horsley, both of whom were escapees from a North Carolina prison camp at the time. They took control of her automobile and drove to Charlotte, North Carolina, where they attempted to rape her and to choke her to death. They stripped her of all her clothing except her shoes and socks. She was stabbed with a knife in various parts of her body and then locked in the trunk of the automobile she had been driving. Baldwin and Horsley then drove the car through South Carolina to Atlanta, Georgia, where they spent the night. They next drove to Montgomery, Alabama, on Interstate Highway 85 and then proceeded to Camden, Alabama, located in Wilcox County. The victim remained locked in the trunk of the car during the entire trip.

"In Camden, the appellant stole a pickup truck which contained a hatchet. Horsley drove the automobile, and the appellant drove the truck to an isolated spot in Monroe County. There they removed the victim from the trunk of the car, and Horsley attempted to run the car over her. After several unsuccessful attempts to kill the victim with the automobile, the appellant took the hatchet from the trunk and killed her with a blow leaving a gaping wound in the base of her neck. The two killers were later arrested in Lanett, Alabama, where they were traveling in the stolen truck. The automobile tag from the victim's car was found in the truck which appellant was driving. Both were transported to the Wilcox County Jail on the truck theft charge."

Baldwin v. State, 372 So.2d 26 (Ala.Crim.App. 1978).

I

The first issue the appellant raises is essentially the same issue he raised on his initial appeal and which was addressed

both by this court and the Supreme Court in the two previous opinions. However, this court must now analyze this issue in a different light because of *Beck*.

The principal question this court must resolve is whether the appellant is entitled to a new trial because the preclusion clause was in effect at the time of his conviction for the instant offense. The appellant contends that although the intentional killing most probably took place in Alabama, the robbery occurred in North Carolina. If such was the case, the appellant claims the State of Alabama did not have jurisdiction over the robbery and thus the appellant could have only been convicted of first degree murder at most in Alabama. Thus, the jury should have been entitled to an instruction on the lesser included offense of murder.

The United States Supreme Court in *Hopper v. Evans*, ___U.S.___, 102 S.Ct. 2049, ___L.Ed.2d ___ (1982) stated:

> "*Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence."

Thus, " '[t]he jury must be permitted to consider a verdict of guilt of a non-capital offense' only when '*the evidence would have supported such a verdict.*' (Additional emphasis supplied.) *Hopper v. Evans*, supra." *Bryars v. State*, [Ms. 3 Div. 304, August 30, 1983] ___So.2d ___ (Ala.Crim.App. 1983).

Following the United States Supreme Court's decisions in *Beck* and *Hopper*, the Alabama Supreme Court in *Cook v. State*, 431 So.2d 1322 (Ala. 1983) stated that in the determination of whether an appellant, who was convicted of a capital offense when the preclusion clause was in effect, is entitled to a new trial, the test to be applied is:

> "(1) Was there any evidence presented at trial upon which a conviction of a lesser included offense could have been based? (2) If not, has the defendant suggested any plausible claim which he might conceivably have made, had there been no preclusion clause, that is not contradicted by his own testimony at trial? If the answer to both of these questions is no, then a conviction at trial is due to be affirmed."

The evidence at trial conclusively established that the appellant and his companion took control of the vehicle in which the victim was driving in North Carolina. There was some conflicting evidence presented as to whether the victim was killed in Alabama or North Carolina. The appellant urges that if the robbery occurred in North Carolina and the killing took place in Alabama, then he could only be convicted of murder in Alabama and robbery in North Carolina because the two acts were separate offenses. Thus, reversible error occurred because the jury was prohibited by the preclusion clause from considering the lesser included offense of murder.

We do not agree. As Judge Bookout stated in his opinion in this appellant's original appeal, quoting from the opinion in the appellant's companion's appeal [*Horsley v. State*, 374 So.2d 363 (Ala.Crim.App. 1978)]:

> " 'Notwithstanding the importance of robbery as an essential element of the crime charged, it did not constitute the crime charged in the indictment or a crime proscribed by the death penalty statute. No crime proscribed by that statute falls short of an intentional killing. Each of the fourteen crimes enumerated in the statute has within it the culminating factor of an intentional homicide. The statute is for the prevention and punishment of homicides committed under legislatively determined aggravating circumstances. It is impossible to complete, to consummate, any of the fourteen crimes enumerated without the intentional[ly] taking of the life of a human being . . .' "

Baldwin v. State, 372 So.2d 26 (Ala.Crim.App. 1978).

Justice Torbert, reiterating this position in his opinion in this case said:

"The crime of robbery when the victim is intentionally killed is a single offense beginning with the act of robbing or attempting to rob and culminating with the act of intentionally killing the victim. The offense consists of two elements, robbing and intentionally killing, but does not consist of two separate *offenses*. See *Ex parte Clements*, 370 So.2d 723 (Ala. 1979); *Horsley v. State*, [1 Div. 931] (Ala.Crim.App. 1978). Therefore, although the offense was commenced in North Carolina, it was not consummated until Naomi Rolon was killed in Monroe County, Alabama."

Baldwin v. State, 372 So.2d 32 (Ala. 1979).

Therefore, the robbery at issue was a continuing offense which began in North Carolina and culminated in Alabama. Thus, this issue was resolved by the jury which properly found that the robbery and the killing occurred in Alabama.

Furthermore, even if there was evidence that both the robbery and intentional killing took place in North Carolina, the appellant would still not be entitled to request a lesser included offense instruction. If both of these crimes were committed in North Carolina, then Alabama would have no jurisdiction over the case and the appellant could not have been convicted of either offense in Alabama. Whether the killing took place in North Carolina or Alabama was a question for the jury which they properly resolved after considering all of the evidence.

After reviewing the evidence in this case and the theories which the appellant has raised in light of *Beck*, and the cases which have followed, we conclude the appellant was not due an instruction on the lesser included offense of murder.

II

The appellant urges that the prosecutor's remark during his opening statement concerning the appellant's escape from a prison camp in North Carolina constitutes error.

Generally, evidence of other crimes which a defendant has committed is not admissible at his trial on a particular offense. *McElroy's Alabama Evidence*, § 69.01 (1), Third

Edition (1977). However, the prosecutor's statement falls within one of the widely recognized exceptions to the general rule.

". . . [I]f two or more crimes constitute one criminal transaction, evidence of the other crime or crimes is admissible. In *Parsons v. State*, 251 Ala. 467, 477, 38 So.2d 209, it was stated:

'But the rule is that if several crimes in fact constitute one criminal transaction, evidence of all such crimes may be given as part of the res gestae of the offense with which defendant is charged. *Allison v. State*, 1 Ala.App. 206, 55 So. 453; *Askew v. State*, 6 Ala.App. 41, 60 So. 455; *Ingram v. State*, 39 Ala. 247, 84 Am.Dec. 782.'

"Judge McElroy, citing numerous supporting authorities, has the following to say on the subject:

'Evidence of accused's commission of another crime is admissible if such other crime is inseparably connected with, or is a 'part of the res gestae' of the, now-charged crime; or, if such other crime and the now-charged crime are parts of one continuous transaction or one continuous criminal occurrence . . .' McElroy, *Law of Evidence in Alabama*, § 69.01 (3)."

Brown v. State, 338 So.2d 1050 (Ala.Crim.App. 1976).

From a review of the record, it is clear to this court that this escape commenced the series of events that eventually led to the killing of the victim herein. Thus, the prosecutor's remark was properly allowed.

Furthermore, the appellant's statement was later admitted into evidence and in this the appellant told of his escape from the prison camp and of the unfortunate sequence of events that followed the escape. There is no error on this issue.

III

The appellant contends one of the prospective jurors, Julia Preyear, was improperly excluded from the jury venire and asserts she was excused solely because of her opposition to

the death penalty, and not because of the requirements set out in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

The relevant portion of the record is set out below:

"THE COURT: Mr. Pearson and Mr. Morrow, they seem to be qualified. Do you have any additional questions from the State?

"MR. PEARSON: We have a couple. We would like to know if anybody has any religious scruples, or any other scruples, about fixing punishment at death in this case if the State proves beyond a reasonable doubt that the defendant is guilty.

"THE COURT: Ladies and gentlemen of the jury, do any of you have any scruples, religious or otherwise, which would prevent you from sentencing this defendant to death by electrocution, if, in your mind, his guilt had been established beyond a reasonable doubt and to a moral certainty? (No response.)

"THE COURT: Do you understand the question? Do any of you have any scruples, religious or otherwise, if you were selected as a juror in this case that you could not pronounce the judgment of execution against this defendant if his guilt had been established beyond a reasonable doubt and to a moral certainty?

"A JUROR: Yes, sir.

"THE COURT: Are you a juror?

"A JUROR: Yes, sir.

"THE COURT: What is your name, please?

"A JUROR: Julia Preyear.

"THE COURT: Mrs. Preyear, stand up and tell me what you want to tell me, please.

"THE JUROR, JULIA PREYEAR: I just don't believe in capital punishment.

"THE COURT: You don't believe in capital punishment?

"THE JUROR, JULIA PREYEAR: No, sir.

"THE COURT: Mrs. Preyear, are you telling this Court that if you were on this jury and if you were convinced beyond a reasonable doubt of the guilt of this defendant that you could not or would not follow the law and fix his punishment at death? Is that what you are telling this Court?

"THE JUROR, JULIA PREYEAR: Yes, sir, that's right.

"MR. PEARSON: We would challenge her, Judge.

"THE COURT: The challenge will be sustained as to Mrs. Julia Preyear." (R. 24-25).

In *Wilson v. State*, 371 So.2d 932 (Ala.Crim.App. 1978), affirmed 371 So.2d 943 (Ala. 1979), vacated on other grounds, 448 U.S. 903, 100 S.Ct. 3042, 65 L.Ed.2d 1133 (1980), remand, 405 So.2d 696 (Ala. 1981), Judge Bowen stated:

> "A prospective juror may be excused for cause where he has been examined by the trial judge and a determination made that the juror's feelings as to capital punishment are sufficiently strong so that he would automatically refuse to impose a death sentence regardless of the evidence produced at trial and despite of the instructions of the trial court. *Witherspoon*, 391 U.S. at 522, 88 S.Ct. at 1777. In accordance with the general law that allows a juror who is not impartial to be challenged for cause, a prospective juror may properly be excused for cause where his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt. *Witherspoon*, 391 U.S. 522, n.21, 88 S.Ct. 1770." (Footnotes omitted).

The prospective juror, Mrs. Preyear, made it very clear to the trial judge that she could not sentence the appellant to death if she were convinced the appellant was guilty beyond a reasonable doubt. Certainly, it would be absurd to believe that if she were not so convinced of his guilt beyond a reasonable doubt, that she would consider fixing his punishment at death.

The appellant claims, citing *Witherspoon*, supra, that a prospective juror can only be excluded from the venire "if he is irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."

However, it is well recognized that the exact words in *Witherspoon* do not have to be used when the trial judge examines the prospective jurors concerning their views on the imposition of the death penalty. *Wilson v. State*, supra.

From our review of the pertinent portion of the record, we are convinced that Mrs. Preyear unequivocably told the trial judge that she could not, under any circumstances, impose the death penalty on this appellant, and that she would automatically vote against its imposition. We conclude that the trial judge's examination of Mrs. Preyear concerning her feelings about capital punishment was proper and that her subsequent exclusion did not offend the principles of *Witherspoon*.

IV

The appellant argues that the trial judge, during his determination of this sentence, improperly considered two nonstatutory aggravating circumstances, and therefore, his sentence of death should not be permitted to stand.

The trial judge in his written findings of fact cited five aggravating circumstances and one mitigating circumstance. (See Appendix A). Three of the aggravating circumstances fall clearly within the list of aggravating circumstances enumerated in § 13-11-6, Code of Alabama 1975 (the Code section in effect at the time of the appellant's conviction) and § 13A-5-49, Code of Alabama 1975. We must now examine more closely the other two aggravating circumstances to determine if they were improperly considered.

A

The first finding that the appellant claims the trial judge should not have considered is set out below:

> "(b) The Court further finds that the defendant had previously plead guilty to a felony in the state of North Carolina involving the use of violence to the person of the victim and was sentenced to five years imprisonment in the North Carolina penitentiary as a youthful offender." (R. 308).

Clearly, a defendant's conviction for a crime of violence can be an aggravating circumstance. Ala.Code § 13-11-6(2) (1975); Ala. Code § 13A-5-49(2) (1975). The question before us is whether the appellant's adjudication as a youthful offender prohibits consideration of that conviction as an aggravating circumstance. Under the Alabama statute, after one is adjudged a youthful offender, any determination of guilt shall not be deemed a conviction,[2] and thus, could not be an aggravating circumstance under § 13-11-6(2) or § 13A-5-49(2) Code of Alabama (1975). However, the appellant was not adjudicated as a youthful offender in Alabama, but in North Carolina. Therefore, the laws of that state regarding youthful offender status should here govern.

As the state correctly points out in its brief, the intent of the youthful offender statute in North Carolina is completely different from Alabama's youthful offender statute.

In Alabama, the proceedings under the Youthful Offender Act are not criminal in nature and are used to protect persons in a specified age group, who would otherwise be tried as adults, from the harsh consequences of the criminal adjudicatory process. *Raines v. State*, 294 Ala. 360, 317 So.2d 559 (1975).

> "The Youthful Offender Act is intended to extricate persons below twenty-one years of age from the harshness of criminal prosecution and conviction. It is designed to provide them with the benefits of an informal, confidential, rehabilitative system. A determination that one is a youthful offender (1) does not disqualify the youth from public office or public employment, (2) does not operate as a forfeiture of any right or privilege, (3) does not make

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[2] Ala. Code § 15-19-7(a) (1975). There is no similar provision in the North Carolina statutes.

him ineligible to receive any license granted by public authority, and (4) shall not be deemed a conviction of crime; and (5) the record shall not be open to public inspection except upon permission of the court. Title 15, § 266(6), Code of Alabama."

Raines v. State, supra. See also commentary in § 15-19-1 through § 15-19-7, Code of Alabama 1975.

The purpose of North Carolina's Youthful Offender Statute is clearly set out in § 148-49.10, N.C. Gen. Stat.:

"The purposes of this Article are to improve the chances of correction, rehabilitation and successful return to the community of youthful offenders sentenced to imprisonment by preventing, as far as practicable, their association during their terms of imprisonment with older and more experienced criminals, and by closer coordination of the activities of sentencing, training in custody, parole, and final discharge. *It is the intent of this Article to provide the courts with an additional sentencing possibility to be used in the court's discretion for correctional punishment and treatment* in cases, where in the opinion of the court a youthful offender requires a period of imprisonment, but no longer than necessary for the Parole Commission to determine that the offender is suitable for a return to freedom and is ready for a period of supervised freedom as a step toward unconditional discharge and restoration of the rights of citizenship." (Emphasis added).

In *State v. Niccum*, 293 N.C. 276, 238 S.E. 2d 141 (1977), the Supreme Court of North Carolina stated:

"In summary, the purposes of Article 3A[3] as stated in G.S. 148-49.1 were to improve the chances of rehabilitating youthful offenders: (1) by segregating them, as far as practicable, from older and more experienced criminals; and (2) by providing the court with 'an additional sentencing possibility' to be used for correctional punishment and treatment in cases where, in its opinion, a youthful offender required imprisonment only for the time necessary for the Board of Paroles to determine his suitability for a return to supervised freedom. Article 3A, *ipsissimis verbis*, could have no application to capital cases.

[3]Article 3A was repealed by the North Carolina Legislature 1977 N.C. Sess. Laws, C. 732, S.1, and has been basically reincorporated in Article 3B (which includes § 148-49.10 through § 148-49.16, N.C. Gen. Stat.)

"As defined in Article 3A, 'a '*youthful offender' is a person under the age of 21 at the time of conviction*, and a 'committed youthful offender' is one committed to the custody of the Commissioner of Correction under the provisions of this Article.' G.S. 148-49.2.

"*Upon a youthful offender's conviction* of an offense punishable by imprisonment G.S. 148-49.4 authorized the court, 'in lieu of the penalty of imprisonment otherwise provided by law,' to sentence him to the custody of the Commissioner of Correction for supervision and treatment pursuant to Article 3A until discharged at the expiration of the maximum term imposed or released conditionally or unconditionally by the Board of Paroles." (Footnote and emphasis added).

It is clear from reading the above cited statute and case that the North Carolina Youthful Offender Statute serves a different purpose than the Alabama statute. A determination of guilt of a youthful offender in North Carolina is a conviction, the same as if he had been tried and found guilty as an adult. The only preferential treatment a youthful offender receives is in the sentencing procedure. Therefore, we conclude that the North Carolina legislature, in inacting their youthful offender statute, intended an adjudication of guilt of a youthful offender to be a conviction, as the term is commonly used. Since the appellant was convicted and sentenced as a youthful offender in North Carolina, we must also consider the appellant's determination of guilt of that offense as a conviction. The trial judge herein properly considered the appellant's conviction under the North Carolina Youthful Offender Statute as an aggravating cricumstance.

B

The second finding which the appellant contends was improperly considered as an aggravating circumstance is as follows:

> "(c) The Court further finds that the defendant was previously charged in the state of North Carolina with the offense of kidnapping and rape, which said offenses were disposed of in juvenile proceedings by defendant being adjudged delinquent by reason of the charge of assault to commit rape." (R. 309).

Clearly, rape and kidnapping are violent offenses but we cannot analyze an adjudication of guilt in a juvenile proceeding in the same manner as we did as to the appellant's youthful offender conviction. In North Carolina, as in Alabama, juvenile proceedings are not criminal in nature and a determination of delinquency is not a conviction. Section 7A-638, N.C. Gen. Stat.; *In re Drakeford*, 32 N.C. App. 113, 230 S.E.2d 779 (1977). The appellant's adjudication of guilt in the juvenile proceedings does not fall within one of the aggravating circumstances enumerated in § 13-11-6 or § 13A-5-49, Code of Alabama 1975. Thus, the question we have before us is whether the appellant's sentence of death can constitutionally be permitted to stand when the trial judge considered an aggravating circumstance not set out in the Alabama code.

Current case law in Alabama indicates that when a trial judge relies upon an invalid aggravating circumstance, the case must be remanded to the trial court for a new sentencing hearing. See *Ex Parte Bracewell*, 407 So.2d 853 (Ala. 1981) and Judge Bookout's special concurrence in *Bracewell v. State*, 407 So.2d 848 (Ala.Crim.App. 1979); *Johnson v. State*, 378 So.2d 1164 (Ala.Crim.App. 1979). But see *Mack v. State*, 375 So.2d 476 (Ala.Crim.App. 1978) (wherein this court affirmed the death sentence where there was only one valid aggravating circumstance and several invalid aggravating circumstances).

The trial judge's reliance on the non-statutory aggravating circumstance was clearly error. However, in light of two recent

United States Supreme Court cases, *Zant v. Stephens*, ___U.S.___, 103 S.Ct. 2733, ___L.Ed.2d ___ (1983) and *Barclay v. Florida*, ___U.S.___, 103 S.Ct. 3418, ___L.Ed.2d ___ (1983), we must now determine if the consideration of the non-statutory aggravating circumstance constituted "harmless error."

The *Barclay* decision is more helpful in our analysis of this issue because the Florida death statute is so similar to Alabama's because it also requires the jury and the trial judge to weigh both the aggravating and mitigating circumstances in order to determine whether the death penalty is the appropriate sentence in a particular case. Fla.Stat.Ann. § 921.141 (Supp. 1976-1977). Furthermore, Florida law also forbids the consideration of non-statutory aggravating circumstances in the balancing process. *Barclay v. Florida*, supra.

In *Barclay*, the trial judge found several statutory aggravating circumstances but also relied on one non-statutory aggravating circumstance. The United States Supreme Court decided this was error but stated. ". . . [M]ere errors of state law are not the concern of this court, *Gryger v. Burke*, 334 U.S. 728, 731, 68 S.Ct. 1286, 1257, 92 L.Ed.2d 1683 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States constitution." *Barclay v. Florida* at 3428. The Supreme Court analyzed this issue to see if the consideration of the non-statutory aggravating circumstance rose to the level of a constitutional violation. They concluded that it did not.

> "There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. See n. 9, supra, 'What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.' *Zant, supra*, at 16 (emphasis in original)."

Barclay v. Florida, supra.

However, the Supreme Court warned that in some cases, the consideration of improper aggravating circumstances will not be deemed "harmless error."

> "The thrust of our decisions on capital punishment has been 'that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' *Zant v. Stephens* ____U.S.____, 11 (1983), quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)"

Trial judges must not be allowed to rely on nonstatutory aggravating circumstances that are so arbitrary and improper as to offend the Constitution. As long as the trial judge properly exercises his discretion and the facts indicating the death penalty are "so clear and convincing that virtually no reasonable person could differ," a harmless error analysis can be used. *Barclay v. Florida*, supra.

The safeguard in employing a harmless error analysis is that:

> ". . . Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' *State v. Dixon*, 283 So.2d 1, 10 (1973). 428 U.S., at 248-251 (footnotes omitted) (emphasis supplied)."

Barclay v. Florida, supra.

The *Barclay* case differs from the case at bar in one important respect. In *Barclay*, the trial judge found no mitigating circumstances while the trial judge in this case found the appellant's age to be a mitigating circumstance.

A case has recently been decided by the United States Eleventh Circuit, which dealt with the same situation that we have in this cause. In *Witt v. Wainwright*, [No. 81-5750, September 16, 1983] ____F.2d ____ (11th Cir. 1983),[4] the trial judge relied on two statutory aggravating circumstances, two non-statutory aggravating circumstances and only one mitigating circumstance, i.e., the defendant's age, in making his determination that the defendant should receive the death penalty. The court, in affirming the defendant's sentence of death, relied heavily on a Florida Supreme Court case, *Brown v. State*, 381 So.2d 690 (Fla. 1980). The Florida Supreme Court in that case stated:

> "Although improper aggravating circumstances (factors enumerated 1 and 2) went into the calculus of the trial judge's sentence decision and there was identified a mitigating circumstance (appellant's age), nevertheless, *Elledge v. State*, 346 So.2d 998 (Fla. 1977) does not compel a reversal of the sentence judgment in this case. This is so because unlike *Elledge*, here 'we can know' that the result of the weighing process would not have been different had the impermissible factors not been present. 346 So.2d at 1003.
>
> "The trial judge has told us in his order that the appellant's age, 22 years at the time of the offense and 23 years at the time of the trial, had only 'some minor significance.' When this tenuous factor is juxtaposed against at least two well-founded aggravating circumstances it is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstances. This case then is dissimilar to *Elledge*, but like *Hargrave v. State*, 366 So.2d 1 (Fla. 1978), where the doubling up of aggravating circumstances was not fatal to the imposition of a death

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[4]The opinion of the Eleventh Circuit in *Witt* is an excellent discussion and analysis of the recent cases that have dealt with the issue of the consideration of nonstatutory aggravating circumstances.

sentence even in light of the existence of two mitigating circumstances. Here, as there, ample other statutory aggravating circumstances exist to convince us that the weighing process has not been compromised."

The conclusion of the court was that,

"[g]iven the imprecision of the criteria set forth in our capital punishment statute we must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum. *Hargrave v. State*, supra; *State v. Dixon*, 283 So.2d 1 (Fla. 1973)."

Brown v. State, supra.

In *Witt*, the court distinquished another case, *Goode v. Wainwright*, 704 F.2d 593 (11th Cir. 1983), in which it was held the "harmless error" rule did not apply.

"The case at bar differs from *Goode* in a subtle, yet significant manner. Unlike *Goode*, the instant case involves the existence of only a single and insubstantial mitigating circumstance, i.e., age.

". . .

"While there is no doubt that the sentencing judge relied heavily upon the aggravating factor which the state procedures themselves forbid in imposing the death penalty upon Witt, it is not entirely apparent that all other defendants in Florida would have been entitled to resentencing under these circumstances, because of the existence of only a single and insubstantial mitigating circumstance, i.e., age. Consequently, it is also not entirely apparent that the concerns expressed in *Goode* over arbitrary and freakish executions should be invoked in *Witt's* case. See *Gregg v. Georgia*, 428 U.S. 153, 188-89, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976)."

Witt v. Wainwright, supra.

Furthermore, the Eleventh Circuit went on to say that, "we believe Witt's claims are properly encompassed within *Barclay's* affirmance of Florida's procedures. Indeed, the

concurrence in *Barclay* suggests that the reasoning of that opinion extends to the Florida Supreme Court's handling of the *Brown* case. See ____U.S. at ____ n. 12, 103 S.Ct. at 3432 n. 12 (Stevens, J., concurring, joined by Powell, J.)."

In light of *Witt* and *Barclay*, it is our conclusion that it is proper to apply a "harmless error" analysis to the case at bar. The trial judge only considered one improper aggravating circumstance (the appellant's juvenile record) and the only mitigating circumstance (the appellant's age) was the same as was addressed by the Florida Supreme Court in *Brown v. State*, supra, and by the Eleventh Circuit in *Witt*.

Therefore, although the consideration of the non-statutory aggravating circumstance was clearly error, it was harmless error when viewed in light of the other aggravating circumstances in this case.

From our review of the trial judge's findings of fact, even in the absence of the non-statutory aggravating circumstance, the aggravating circumstances far outweigh the single mitigating circumstance. The trial judge properly exercised his discretion in sentencing this appellant to death. Therefore, a new sentencing hearing is not required in this cause.

V

This court is required by § 13A-5-53(a) Code of Alabama, 1975 to independently review each case in which the sentence of death is imposed to determine.

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

"(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Alabama Code § 13A-5-53(b), see also *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

First, we do not believe the trial judge's sentence was imposed under any passion or prejudice or for an arbitrary reason.

Secondly, as we stated in our previous discussion, the statutory aggravating circumstances greatly outweighed the single mitigating circumstance and we do not feel that the trial judge's consideration of the non-statutory aggravating circumstance affected the balance to any significant degree.

Thirdly, the appellant's sentence of death has been imposed in similar cases. See *Luke v. State*, [Ms. 4 Div. 98, March 1, 1983] ___So.2d___ (Ala.Crim.App.), affirmed, [Ms. 82-622, September 30, 1983] ___So.2d___ (Ala. 1983); *Ritter v. State*, 429 So.2d 928 (Ala. 1983); *Womack v. State*, 435 So.2d 754 (Ala.Crim.App. 1982), aff'd 435 So.2d 766 (Ala. 1983).

The State of Alabama's application for rehearing is herewith granted. The judgment of reversal by this court dated October 6, 1981 is hereby set aside.

For the reasons stated above, the judgment of conviction and sentence of death are hereby affirmed.

We have carefully again examined this record and find no error therein. Application for rehearing granted. Judgment affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX A

IN THE
CIRCUIT COURT OF MONROE COUNTY, ALABAMA
CASE NO. CC-77-51

STATE OF ALABAMA

vs.

BRIAN KEITH BALDWIN, DEFENDANT

The Court, having conducted a hearing pursuant to Title 15, Section 342(6) of the 1940 Code of Alabama, as amended, to determine whether or not the Court will sentence Brian Keith Baldwin to death or to life imprisonment without parole; and the Court having considered the evidence presented at the trial and at said sentence hearing; the Court makes the following findings of fact:

The Court first considers the aggravating circumstances as set out in Title 15, Section 342(8) of the 1940 Code of Alabama, as amended:

(a) The Court finds that the capital felony of robbery in the course of which the victim was intentionally killed was committed by the defendant while he was under sentence of imprisonment in the state of North Carolina but from which he had escaped.

(b) The Court further finds that the defendant had previously plead guilty to a felony in the state of North Carolina involving the use of violence to the person of the victim and was sentenced to five years imprisonment in the North Carolina penitentiary as a youthful offender.

(c) The Court further finds that the defendant was previously charged in the state of North Carolina with the offense of kidnapping and rape, which said offenses were disposed of in juvenile proceedings by defendant being adjudged delinquent by reason of the charge of assault to commit rape.

(d) The Court further finds that the capital felony was committed while the defendant was in the commission of robbery or flight after committing the said crime of robbery.

(e) The Court further finds that under the circumstances of this case as revealed by the record, the capital felony was especially heinous or atrocious or cruel.

The Court now considers mitigating circumstances as described in Title 15, Section 342(9) of the 1940 Code of Alabama, as amended.

(a) The Court finds the only mitigating circumstance to be the age of the defendant at the time of the commission of the crime, to-wit, eighteen.

The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances, it is the judgment of the Court that the aggravating circumstances for outweigh the mitigating circumstances and that the death penalty as fixed by the jury should be and is hereby accepted.

It is therefore Considered and Adjudged by the Court that Brian Keith Baldwin is guilty of the capital felony charged in the indictment, and specifically of intentionally killing Naomi Rolon during the robbery or attempt thereof of the said Naomi Rolon, deceased.

It is therefore Ordered and Adjudged that you, Brian Keith Baldwin, suffer death by electrocution at any time before the hour of sunrise on the 9th day of December, 1977, inside the walls of the William C. Holman Unit of the Prison System at Atmore, Alabama, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

It is therefore further Ordered and Adjudged by the Court that the Warden of William C. Holman Unit of the Prison System at Atmore, or in case of his death, disability, or absence, his deputy, or in the event of the death, disability, or absence of both the Warden and his deputy, the person appointed by the Commissioner of Corrections, at any time

before the hour of sunrise, shall on the 9th day of December, 1977, inside the walls of the William C. Holman Unit of the Prison System at Atmore, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of the said Brian Keith Baldwin, a current of electricity of sufficient intensity to cause his death, and the continuance and application of such current through the body of the said Brian Keith Baldwin, until the said Brian Keith Baldwin be dead. May God have mercy on your soul.

ORDERED this 9th day of September, 1977.

Circuit Judge
Thirty-fifth Judicial Circuit of Ala.
State of Alabama

Filed
Sep. 9, 1977
John M. Sawyer
Clerk of Court

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1984

Ex Parte: Brian Keith Baldwin

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: BRIAN KEITH BALDWIN

v.

83-276

STATE)

PER CURIAM.

Brian Keith Baldwin was indicted for, and convicted of, the capital offense of "robbery . . . with the aggravated circumstance of intentionally killing the victim." Ala. Code 1975, § 13-11-2(a)(2) (repealed 1981, Act No. 81-178, § 20, but effective as to conduct occurring before July 1, 1981). He was sentenced to death.

The conviction was affirmed originally by the Court of Criminal Appeals in 1978, *Baldwin v. State*, 372 So. 2d 26 (Ala. Crim. App. 1978), and by this Court in 1979, *Ex Parte Baldwin*, 372 So. 2d 32 (Ala. 1979) (*Baldwin I*). After having granted certiorari, the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of *Beck v. Alabama*, 447 U.S. 625 (1980). *Baldwin v. Alabama*, 448 U.S. 903 (1980). This Court remanded the case to the Court of Criminal Appeals, *Baldwin v. State*, 405 So. 2d 699 (Ala. 1981), which once again affirmed the conviction, *Baldwin v. State*, [MS. November 1, 1983] ___So.2d___ (Ala. Crim. App. 1983). Baldwin's present petition for writ of certiorari was granted as a matter of right under A. R. A. P., Rule 39(c).

The facts of this case have been set out repeatedly in the above decisions. We only briefly reiterate them. Petitioner and Edward Horsley, escapees from a North Carolina prison camp, abducted their young victim in Hudson, North Carolina. They took control of her automobile and locked her in the trunk. They then drove the car from North Carolina, through South Carolina and Georgia, to Monroe County, Alabama, where they intentionally killed her. Petitioner and Horsley had separate trials in the Circuit Court of Monroe County.

Petitioner now raises these issues:

(1) Was petitioner prejudiced at trial by the existence of the preclusion clause and, therefore, entitled to a new trial under *Beck v. Alabama*, 447 U.S. 625 (1980)?

(2) Was the prosecutor's remark in his opening statement, that the petitioner had escaped from a prison camp in North Carolina, reversible error?

(3) Was a prospective juror improperly excluded under *Witherspoon v. Illinois*, 391 U.S. 510 (1968)?

(4) Are the sentencing provisions of the 1975 Death Penalty Act, under which petitioner was sentenced, unconstitutional?

(5) Was it improper to consider the petitioner's prior youthful offender and juvenile adjudications as aggravating circumstances to support the sentence of death?

I.

Petitioner's trial was held in 1977, before the preclusion clause of the 1975 Death Penalty Act was struck down by the United States Supreme Court in *Beck v. Alabama*, 447 U.S. 625 (1980). The only offense with which petitioner was charged, and for which he was tried, was the capital offense of robbery in which the victim is intentionally killed. In accordance with the then existing preclusion clause, contained in § 13-11-2(a), Ala. Code 1975, the jury was not allowed to consider any lesser included offenses during its deliberations. It returned a verdict of guilty of capital murder.

Petitioner now contends that under *Beck v. Alabama*, *supra*, he is entitled to a new trial because he was prejudiced

by the existence of the preclusion clause. The complete test to determine the effect of the preclusion clause on a pre-*Beck* trial was set out in *Cook v. State*, 431 So. 2d 1322 (Ala. 1983):

> "(1) Was there any evidence presented at trial upon which which a conviction of a lesser included offense could have been based? (2) If not, has the defendant suggested any plausible claim which he might conceivably have made, had there been no preclusion clause, that is not contradicted by his own testimony at trial? If the answer to both of these questions is no, then a conviction at trial is due to be affirmed."

Cook v. State, 431 So. 2d at 1324. The first question is taken from *Beck v. Alabama, supra*. The second one was posed first in *Hopper v. Evans*, 456 U.S. 605 (1982).

Petitioner asserts that the answer to both questions is yes. We do not agree.

Regarding the first part of the test, petitioner contends that although the murder most probably occurred in Alabama, the great weight of the evidence shows that the robbery, if any, took place entirely within North Carolina, where he and Horsley took control of the victim's car. Petitioner argues that he committed, at most, first degree murder in Alabama, and he would have been entitled to a jury charge on this offense had the preclusion clause not existed.

Alabama's jurisdiction to try and convict petitioner for the capital offense of robbery in which the victim is intentionally killed is not dependent upon the venue of the robbery. Petitioner may be convicted of this offense regardless of where the robbery occurred. Therefore, evidence that the robbery took place in North Carolina does not entitle petitioner to a jury charge on first degree murder. We made this clear in *Baldwin I* when we defined this capital offense and held that Alabama had jurisdiction to convict petitioner of the crime:

> "The crime of robbery when the victim is intentionally killed is a single offense beginning with the act of robbing or attempting to rob and culminating with the act of intentionally killing the victim. The offense consists of two elements, robbing and intentionally killing, but does not

consist of two separate *offenses*. See *Ex parte Clements*, 370 So. 2d 723 (Ala. 1979); *Horsley v. State*, [1 Div. 931] (Ala. Crim. App. 1978). Therefore, although the offense was commenced in North Carolina, it was not consummated until Naomi Rolon was killed in Monroe County, Alabama.

"The place where the crime was consummated is the place where the crime was committed and the place where the defendant may be tried. 21 Am. Jur. 2d *Criminal Law* § 399, at 416. Section 15-2-4 provides:

> " 'When the commission of an offense commenced elsewhere is consummated within the boundaries of the state of Alabama, the offender is liable to punishment in Alabama, although he was out of the state at the commission of the offense charged, if he consummated it in this state through the intervention of an innocent or guilty agent or by any other means proceeding directly from himself; and venue in such case is in the county in which the offense was consummated, unless otherwise provided by law.'
>
> "§ 15-2-4, Code 1975.
>
> "Accordingly, venue did lie in Monroe County and petitioner was properly tried and convicted. The decision of the Court of Criminal Appeals is affirmed."

Baldwin I, 372 So. 2d at 33, 34.

We have searched the entire record and have found no other evidence to support a verdict of guilty of a lesser included offense. Petitioner is not entitled to a new trial under *Beck v. Alabama, supra*, and the answer to the first question must be no.

Prior to closing arguments at trial, the trial court ruled that Alabama had jurisdiction to convict the petitioner of the capital offense, if *both* the robbery and the intentional killing occurred in Alabama. It also determined that the venue of the crime was a question of fact to be determined by the jury. It instructed the jury accordingly:

"I think this case really comes down to this, ladies and gentlemen. I want to put it to you in two different questions. There are two questions that this jury must answer: First, did the defendant rob Naomi Rolon in Monroe County, Alabama, as I have defined the term? Second, did the defendant intentionally kill Naomi Rolon in Monroe County, Alabama, in the course of said robbery?

"If each and every one of you are convinced beyond a reasonable doubt and to a moral certainty that the answer to each of these questions is 'yes,' your verdict should be guilty. If you are not so convinced, your verdict should be not guilty."

Petitioner correctly argues that the decision in *Baldwin I* necessarily holds that the trial court's charge to the jury was incorrect. However, petitioner was not prejudiced by this error. Under the court's charge, the jury was required to find not only that the petitioner intentionally killed the victim in Monroe County, but also that he robbed her there. This charge, although erroneous, was to petitioner's benefit, not his detriment. Petitioner argues otherwise. He contends that this charge presented to the jury the very dilemma that the United States Supreme Court hoped to eradicate by its decision in *Beck v. Alabama, supra*. It was concerned that a jury would convict a defendant of a capital offense, even if it had some doubt as to the existence of some element of the crime, rather than let the defendant go free. However, we find that petitioner's case is different. Even if the jury had some doubt about the venue of the robbery, its conviction on the capital offense is supported by the evidence, because, under *Baldwin I*, petitioner is guilty of the offense, regardless of where the robbery took place. The effect of the incorrect jury instruction made it more difficult to convict petitioner, but it did not result in an unconstitutional conviction.

Petitioner next argues that if we affirm *Baldwin I*, which we have done, then his defense at trial was invalid and frivolous, and, consequently, he received ineffective assistance of counsel.

The burden of proof is upon the petitioner. The United States Supreme Court, in a very recent decision, *Strickland v. Washington*, ___U.S.___ (1984) [No. 82-1554, 52 U.S.L.W. 4565], explicitly described the burden of proof with regard to this claim. First, petitioner must show that counsel's performance was so deficient as to fall below an objective standard of reasonableness. Counsel's conduct must be considered within the context of the facts of the particular case and as of the time of the alleged misconduct. Second, petitioner must show that counsel's deficient performance prejudiced the defense and deprived petitioner of a fair trial. Prejudice is shown when, absent the errors, there is a reasonable probability that the jury would have had a reasonable doubt respecting guilt.

At the time of the trial, the defense asserted was not frivolous, because, if the jury had believed petitioner and found the facts to be as he contended, i.e., that the robbery occurred in North Carolina, he would have been acquitted of the charge. Therefore, under the law of the case, trial counsel's decision to use this defense against the charge was sound. Counsel did not fail in the performance of his duty to present the best defense possible under the law. We need not consider the second factor of the test in *Strickland*.

Returning to the test in *Cook v. State, supra*, for the effect of the preclusion clause, we answer the second question of that test in the negative also. Petitioner has not suggested any plausible claim which he would have made had there been no preclusion clause. Petitioner must not only suggest a defense which he might have made, but he must also show that he did not assert the defense because of the preclusion clause. *Hopper v. Evans, supra*; *Ritter v. Smith*, 726 F.2d 1505 (11th Cir. 1984), *petition for cert. filed*, 52 U.S.L.W. 3875 (U.S. May 15, 1984). If we did not require this last showing, petitioner conceivably could assert any defense which has now occurred to him and demand that he be given a new trial at which he may raise a new defense. This could not be what the United States Supreme Court intended in *Hopper v. Evans, supra*, when it formulated this part of the test. That court was concerned with the effect the preclusion clause had

upon the trial, i.e., whether the "brooding omnipresence" of the preclusion clause in any way influenced the defendant's decision on how to defend against a capital charge. The Supreme Court specifically stated that "a defendant might make a plausible claim that he would have employed different trial tactics – for example, that he would have introduced certain evidence or requested certain jury instructions – *but for the preclusion clause*." (Emphasis added.) *Hopper v. Evans*, 456 U.S. at 612-13 n. This should not be construed as an invitation to all defendants tried under the 1975 Death Penalty Act to defend against the capital charge anew before the appellate courts, asserting any new defense not presented at trial, without regard to whether it was one that was considered and discarded because of the preclusion clause.

Petitioner suggested during oral argument that he might have defended by presenting evidence that at the time of the killing he was under the influence of narcotics and unable to form the specific intent to kill. There was no showing that the existence of the preclusion clause stopped petitioner from asserting this defense. There is not even an inference that this was the case. Petitioner could have made this defense at trial and have been acquitted, if it were successful. The jury was charged that specific intent was an element of the capital offense, and that it must find that specific intent in order to return a verdict of guilty. No other claims are put forth by petitioner.

We hold that petitioner was not prejudiced by the existence of the preclusion clause and that he was not entitled to an instruction on a lesser included offense. There was no evidence presented at trial which would have supported a conviction of a lesser included offense, nor has petitioner suggested any plausible claim which he would have made but for the preclusion clause.

II.

Petitioner contends that he was denied an impartial jury as guaranteed by the Sixth Amendment of the United States Constitution, because one of the prospective jurors was excluded improperly. He contends that this prospective juror was excluded solely because she would not fix punishment at

death even if she "were convinced beyond a reasonable doubt of the guilt of this defendant." He argues that *Witherspoon v. Illinois*, 391 U.S. 510 (1968), requires that a juror be excluded only "if [s]he is irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon v. Illinois*, 391 U.S. at 522, n. 21. Petitioner insists that this juror was excluded for reasons which fall below the standard set in *Witherspoon*.

The Court of Criminal Appeals held that this prospective juror was not excluded in violation of the principles of *Witherspoon*. That Court, upon review of the pertinent portion of the record, which is set out in the opinion, found that the prospective juror "unequivocally told the trial judge that she could not, under any circumstances, impose the death penalty on this appellant, and that she would automatically vote against its imposition." *Baldwin v. State*, ____So.2d____ (Ala. Crim. App. 1983). It noted that the trial court does not have to use the exact words of the United States Supreme Court in *Witherspoon* during examination of the jurors in order to fulfill the standards set by that decision.

We adopt the holding of the Court of Criminal Appeals and add one citation. In *Ex Parte Dobard*, 435 So. 2d 1351 (Ala. 1983), we affirmed the exclusion of a prospective juror who had a "fixed opinion against capital punishment" and who would not be able "to return a verdict sentencing someone to the electric chair if they were found guilty beyond a reasonable doubt and to a moral certainty of the crime of the charges." *Dobard*, 435 So. 2d at 1356. The juror's exclusion was proper even though the exact language of *Witherspoon* was not used by the trial court, because it was "difficult to envision how [the] . . . prospective juror could have been more explicit in expressing an unqualified opposition to the death penalty." *Dobard*, 435 So. 2d at 1356. Similarly, in this case, a review of the transcript of the voir dire examination of the prospective juror whose exclusion is questioned makes it unmistakably clear that this prospective juror would not vote for the death penalty under any circumstance.

For these reasons and the reasons contained in the opinion of the Court of Criminal Appeals, we hold that the prospective juror's exclusion was proper and that petitioner was not denied his constitutional right to an impartial jury.

III.

Petitioner next argues that the prosecutor's remarks during his opening statement, that petitioner had escaped from a North Carolina prison camp only hours before meeting the victim and abducting her, were reversible error. The rules regarding what is permissible during opening statement are well settled:

> "Erroneous insistences and prejudicial conduct on the part of district attorneys tend unduly to prejudice and bias the jury against the defendant. It is not permissible for the solicitor to make an emphatic statement that the defendant is guilty of the crime charged. *Rowland v. State*, 31 Ala. App. 605, 20 So. 2d 881 (1945). The prosecution's opening statement to the jury on what it expects to prove should be confined to statements based on facts admissible in evidence. *Higdon v. State*, 25 Ala. App. 209, 143 So. 213 (1932). Counsel, however, is to be allowed considerable latitude in presenting to the jury in his opening statement what he expects the evidence to show. *Rogers v. State*, 49 Ala. App. 78, 268 So. 2d 859 (1972). The trial judge must be given wide discretion in determining whether the making of a certain utterance by the District Attorney requires that a mistrial be granted. *Ballard v. State*, 51 Ala. App. 393, 286 So. 2d 68 (1973)."

White v. State, 294 Ala. 265, 314 So. 2d 857, 861-2 (1975); *cert. denied, White v. Alabama*, 423 U.S. 951 (1975); *reh. denied*, 423 U.S. 1039 (1975).

The issue then is whether the questioned remark was based on facts admissible in evidence. The Court of Criminal Appeals properly answered this question:

> "Generally, evidence of other crimes which a defendant has committed is not admissible at his trial on a particular offense. *McElroy's Alabama Evidence*, § 69.01(1), Third Edition (1977). However, the prosecutor's statement falls within one of the widely recognized exceptions to the general rule.
>
> "'. . . [I]f two or more crimes constitute one criminal transaction, evidence of the other crime or crimes is admissible. In *Parsons v. State*, 251 Ala. 467, 477, 38 So. 2d 209, it was stated:
>
> "'"But the rule is that if several crimes in fact constitute one criminal transaction, evidence of all such crimes may be given as part of the res gestae of the offense with which defendant is charged. *Allison v. State*, 1 Ala. App. 206, 55 So. 453; *Askew v. State*, 6 Ala. App. 41, 60 So. 455; *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782."'
>
> "'Judge McElroy, citing numerous supporting authorities, has the following to say on the subject:
>
> "'"Evidence of accused's commission of another crime is admissible if such other crime is inseparably connected with, or is a 'part of the res gestae' of the, now-charged crime; or, if such other crime and the now-charged crime are parts of one continuous transaction or one continuous criminal occurrence . . .'" McElroy, *Law of Evidence in Alabama*, § 69.01(3)."'
>
> "*Brown v. State*, 338 So. 2d 1050 (Ala. Crim. App. 1976).
>
> "From a review of the record, it is clear to this court that this escape commenced the series of events that eventually led to the killing of the victim herein."

Baldwin v. State, ____So. 2d at ____ (Ala. Crim. App. 1983).

Evidence of the escape is admissible under this exception, and such evidence, in fact, was admitted. Petitioner's sworn statement, in which he told of his escape and the subsequent events, was admitted. The prosecutor was within reason at the time he delivered his opening statement to expect that such evidence would be admitted.

We do not find any abuse of discretion by the trial court in allowing the remark to be made to the jury during the prosecutor's opening statement and, accordingly, affirm the Court of Criminal Appeals decision that there was no reversible error committed.

We hold that petitioner was not entitled to a jury instruction on a lesser included offense. We also hold that there was no reversible error committed during the trial. We have reviewed the entire record of the trial proceeding and find no error which "has or probably has adversely affected the substantial rights of the petitioner." A. R. A. P., Rule 39(k). Accordingly, we affirm the conviction.

IV.

We now consider petitioner's challenge to the sentencing phase of the proceedings. He contends that the sentencing provisions of the 1975 Death Penalty Act, under which he was sentenced, are unconstitutional.

The relevant provisions state:

> "§ 13-11-2(a) If the jury finds the defendant guilty [of one of the aggravated offenses listed in § 13-11-2], it shall fix the punishment at death. . . .
>
> ". . . .
>
> "§ 13-11-3. If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. . . .
>
> "§ 13-11-4. Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death."

These provisions have never been held to be unconstitutional by this Court or by the United States Supreme Court. *Ritter v. State*, 429 So. 2d 928 (Ala. 1983); *Beck v. State*, 396 So. 2d 645 (Ala. 1980). The Eleventh Circuit Court of Appeals, in *Ritter v. Smith*, 726 F.2d 1505 (11th Cir. 1984), however, has held recently that these sentencing provisions are unconstitutional on their face.

Petitioner relies solely upon this Eleventh Circuit decision to support his argument that the 1975 sentencing procedure is unconstitutional. This issue was raised by *Ritter* on a petition for writ of habeas corpus.

The Eleventh Circuit first noted that the 1975 sentencing procedure (§ 13-11-4) provides for a mandatory death sentence by the jury. The Court held that such a death sentence "is unguided and standardless, reflects no consideration of the particular defendant or crime, and is irrelevant to the sentencing process," *Ritter v. Smith*, 726 F.2d at 1516, and is, therefore, unconstitutional. The Court recognized that in Alabama the trial judge, not the jury, is the sentencing authority, and that a separate sentencing hearing is held by the trial judge after the jury returns a verdict of guilty of a capital offense. However, it found that

> "the statute [§ 13-11-4] requires the judge to weigh the mandatory death sentence factor in the balance with his consideration of aggravating and mitigating circumstances in deciding to impose the death penalty. *Id.* Thus, the constitutionally impermissible factor of the jury's mandatory death sentence must be given weight in the judge's own sentencing decision."

The Eleventh Circuit Court of Appeals concluded by holding that

> "the inclusion of the constitutionally invalid factor of the jury's mandatory death sentence in the sentencing determination, and the statutorily required influence of that invalid factor on the judge's sentencing decision, renders the 1975 Alabama death penalty statute's sentencing procedures facially unconstitutional."

Ritter v. Smith, 726 F.2d at 1516-1517.

The United States Supreme Court has also considered the constitutionality of the 1975 sentencing procedure in *Alabama v. Evans*, ___ U.S. ___, 103 S. Ct. 1736 (1983). The Court vacated a stay of execution which had been granted by the district court. In doing so, it stated that "[r]espondent's petition for writ of habeas corpus filed on April 21, 1983, [in the District Court for the Southern District of Alabama] thus seeks to litigate several issues conclusively resolved in prior proceedings [including the constitutionality of the 1975 sentencing procedure] and a claim never before raised." *Alabama v. Evans*, ___ U.S. at ___.

A stay is issued "only if there is a substantial question to be preserved for further proceedings in the courts." *Rosenberg v. United States*, 346 U.S. 273, 288 (1953). Therefore, in order to vacate a stay of execution, the Supreme Court must review all of the issues to determine if any of them are "substantial" and unanswered.

The Supreme Court in *Alabama v. Evans*, *supra*, did review the issue that Ritter raised and which petitioner now raises and did not find that it was a "substantial" question. Evans was executed on the same day, but after the stay was vacated. We cannot presume that the Supreme Court would have allowed the execution to take place if it had had even the slightest doubt whether Evans's challenge to the sentencing procedure had some merit.

This Court also addressed the constitutionality of the 1975 sentencing procedure, one year before the Eleventh Circuit's decision was handed down, in *Ritter v. State*, 429 So. 2d 928 (Ala. 1983), upon remand from the United States Supreme Court for consideration in light of *Hopper v. Evans*, 456 U.S. 605 (1982). *Ritter v. Alabama*, 457 U.S. 1114 (1982). Like petitioner, Ritter was tried in 1977 under the original 1975 Death Penalty Act. He has never been retried or resentenced. We held, *Ritter v. State*, 429 So. 2d 928, as did the Eleventh Circuit, *Ritter v. Smith*, 726 F.2d 1505, that Ritter was not prejudiced by the existence of the preclusion clause at the time of his trial and is not entitled to a new trial under *Beck v. Alabama*, *supra*, or *Hopper v. Evans*, *supra*. This is also what we held in petitioner's case. However, unlike the

Eleventh Circuit, we upheld the sentencing provisions of the 1975 act. We reaffirm that holding today.

Section 13-11-2(a) of the 1975 act mandates that "[i]f the jury finds the defendant guilty, it shall fix the punishment at death." The jury has no discretion in sentencing. The statute also makes it clear, however, that the court, not the jury, is the sentencing authority and that the jury's sentence of death is merely advisory.

> "The requirement that the jury fix punishment of death if it finds the defendant guilty is in no way binding on the trial court in the latter's role as the sentencing authority. Section 13-11-4 provides in pertinent part that, 'notwithstanding the fixing of the punishment at death by the jury . . . ,' the court, following the sentencing hearing and after weighing the aggravating and mitigating circumstances may sentence the defendant to either death or life imprisonment. See, *Beck v. State*, 396 So. 2d 645 (Ala. 1980). Under Alabama's statute the trial court and not the jury is the sentencing authority. *Jacobs v. State*, 361 So. 2d 640 (Ala. 1978)."

Furthermore,

> "Additionally, by providing for separate proceedings for determination of guilt and punishment, Alabama's death penalty statute eliminates those vices enumerated in *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976). In *Roberts*, the court pointed out the constitutional weakness of a mandatory death sentence:
>
> > "'The constitutional vice of mandatory death sentence statutes–*lack of focus on the circumstances of the particular offense and the character and propensities of the offender*–. . . .' (Emphasis added.)
>
> "That point was reemphasized in *Proffit v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), when the Supreme Court said that capital sentencing decisions must focus 'on the circumstances of each individual homicide and individual defendant.' See also, *Enmund v. Florida*, ___ U.S. ___, 102 S. Ct. 3368, 73 L. Ed. 2d

1140 (1982) (O'Connor, J., dissenting). This rationale is for the purpose of 'determin[ing] independently whether the imposition of the ultimate penalty is warranted.' *Proffit*, at 428 U.S. at 253, 96 S. Ct. at 2967.

"In Ritter's case, the trial court had a separate sentence hearing and considered, as it appears in its findings after that hearing, each and every aggravating factor in § 13-11-6 and each and every mitigating factor in § 13-11-7, as well as giving the prosecution and defense an opportunity to present any evidence, documentary or otherwise, as well as to present arguments, as envisioned under § 13-11-3."

Ritter v. State, 429 So. 2d at 935-36.

We emphasize that the trial court must conduct a *separate* sentencing hearing, which is *independent* of the guilt phase of the proceeding. Section 13-11-4 requires the court to weigh all of the aggravating circumstances against all of the mitigating circumstances, and make its sentencing determination. The court shall either sentence the defendant to death, and necessarily accept the jury's sentence, or sentence the defendant to life imprisonment without parole, and necessarily reject the jury sentence.

We hold that the sentencing procedure under the 1975 Death Penalty Act is constitutional, even though the jury has no discretion in sentencing. The statute is saved by the fact that the court, which is the sentencing authority, considers the circumstances of the particular offense and the character and propensities of the offender, i.e., the aggravating and mitigating circumstances, in a separate and independent sentencing hearing, and then imposes the sentence.

In *Beck v. State*, 396 So. 2d 645 (Ala. 1980), we held that a defendant accused of a capital crime should thereafter receive a bifurcated trial. We were concerned that, absent the preclusion clause, a jury would refuse to convict a defendant of a capital crime proven beyond a reasonable doubt because of the enormity of the sentence and the apparently mandatory nature of the death sentence. The bifurcated trial eliminates this "risk that the jury will use its power to decide

guilt to make a *de facto* punishment decision." *Beck v. State*, 396 So. 2d at 660.

However, it has never been held that all defendants sentenced under the 1975 act must be resentenced in accordance with the procedure set out in *Beck v. State, supra*. The United States Supreme Court (Stewart, Powell, and Stevens, JJ.), in *Gregg v. Georgia*, 428 U.S. 153 (1976), stated:

"We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman's* constitutional concerns."

Gregg v. Georgia, 428 U.S. at 195.

We accordingly hold that petitioner is not entitled to be resentenced under *Beck v. State, supra*. The risk with which we were concerned in *Beck* was not present at petitioner's trial. He was not entitled to an instruction on a lesser included offense. The jury could either acquit or convict him of the capital offense. Even though the jury was instructed to sentence him to death if it found him guilty, it convicted him. He was not prejudiced by the fact that the jury had no discretion to consider any sentence except death. True, he could have been sentenced to life without parole by the trial judge, who had that decision to make, since he was not bound by the jury's sentence.

V.

Petitioner argues that the trial judge improperly considered two prior juvenile adjudications, rendered in the state of North Carolina, as aggravating circumstances in support of the death sentence.

The Court of Criminal Appeals addressed this issue and held that it was improper to consider one of the prior ad-

judications. That court found that the elimination of this one, non-statutory, aggravating circumstance did not affect the balance. It was convinced that the sentencing judge would have sentenced petitioner to death, even absent this aggravating circumstance. Having found the error to be harmless error, it affirmed the sentence of death. *Baldwin v. State*, ___ So. 2d at ___ (Ala. Crim. App. 1983).

We have studied the record and the opinion of the Court of Criminal Appeals, and we agree. We would be hard pressed to improve upon the opinion of the Court of Criminal Appeals and, therefore, we adopt that part of it which is addressed to this issue, and we affirm the sentence.

VI.

The sentence of death was not imposed in an arbitrary or capricious manner, nor was it handed down under the influence of passion or prejudice. The sentence was appropriate, as the aggravating circumstances greatly outweighed the mitigating circumstances. We take judicial notice that other defendants convicted of this offense have also received sentences of death. Most notably, Edward Horsley, petitioner's accomplice, has been sentenced to death. *Horsley v. State*, [MS. November 29, 1983] ___ So. 2d ___ (Ala. Crim. App. 1983).

Accordingly, the conviction of petitioner and the sentence of death are affirmed.

AFFIRMED.

Torbert, C. J., Maddox, Faulkner, Almon, Shores, Embry, and Adams, JJ., concur.

Jones, J., concurs in part and dissents in part.

Beatty, J., dissents.

JONES, JUSTICE (concurring in part and dissenting in part).

I dissent only as to Part IV – that portion of the opinion relating to the sentencing phase of the trial. In other words, I would affirm as to all aspects of the appeal except that I would reverse the sentence and remand to the Court of Criminal Appeals with instructions to remand to the trial court for a new sentencing hearing. Consistent with the views expressed in my dissent in *Ritter*,[1] with which Justices Maddox and Adams concurred (and also consistent with Justice Maddox's special concurring opinion on rehearing,[2] in which I, along with Justice Adams, concurred), I believe the restructured, bifurcated proceedings established by this Court in *Beck* upon remand require a new sentencing hearing. *Beck v. State*, 396 So. 2d 645 (Ala. 1980) (*Beck II*).

I do not reach the constitutional question addressed by Judge Johnson, writing for the 11th United States Circuit Court of Appeals in *Ritter v. Smith*, 726 F.2d 1505 (11th Cir. 1984), holding Alabama's pre-*Beck II* mandatory death sentence by the jury, in the event of a guilty verdict, constitutionally defective. These considerations are not of primary concern from the standpoint of State law, however, in light of Alabama's statutory scheme of sentencing, as judicially modified by *Beck II* upon remand.

Because the trial judge is the ultimate sentencing authority, reasons the majority, the mandatory death sentence imposed by the jury is of no consequence (*i.e.*, such procedure is not prejudicial error), where the conviction is due to stand for lack of a meritorious lesser included offense challenge.

In my opinion, this overlooks the statutory scheme (unchanged by this Court's *Beck II* opinion) that gives the jury a

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[1]*Ritter v. State*, 403 So. 2d 155 (Ala. 1981).

[2]The characterization of Justice Maddox's opinion as "concurring specially in denial of rehearing" is an obvious inadvertence and not in keeping with the content of his opinion. His opinion reinforces what I had written in dissent on original deliverance. Because three Justices (Maddox, Adams, and I) would not have reversed the conviction, we necessarily addressed the validity of the sentence issue. Because the majority was reversing and remanding for a new trial as to both the conviction and the sentence, it had no occasion to address the separate issue of whether Ritter was entitled to a new trial as to the sentencing phase only.

vital role in the sentencing process. It may well be that, under the United States Supreme Court's guidelines for administering the death penalty, the statutory scheme would meet federal constitutional muster if the jury's role in the sentencing process had been omitted altogether (assuming, of course, that the statute prescribes an appropriate bifurcated sentencing hearing before the trial judge). But it *was not* omitted. Indeed, the trial judge is statutorily *mandated* to consider the jury's verdict of sentence. Under pre-*Beck II* law, only by acquitting the defendant was the jury authorized to render any verdict other than death. In other words, Baldwin's jury could either find him not guilty, or find him guilty *and* sentence him to die.

If one of the factors that the trial judge *must* duly consider in the exercise of his sentencing prerogative is the sentence pronounced by the jury, then, under the pre-*Beck II* mandatory sentencing procedure, that judicial consideration is necessarily confined to the jury's sentence of death. It is not a matter of not trusting the trial judge to exercise his independent judgment, just the opposite. To be sure, I trust our State trial judges to follow the spirit, as well as the explicit mandate, of the statute requiring them to give due consideration to the jury's pronouncement of sentence, and to exercise their independent judgment accordingly.

Obviously, the legislature, in retaining the jury's role in the two-step sentencing process, intended for the trial judge, as the final sentencing authority, to have the benefit of the community's input as expressed in the jury's "recommendation" of sentence. That legislative will – as a due process requisite – is thwarted where the jury is legally bound to "recommend" only the death penalty.

BEATTY, JUSTICE (dissenting):

I adhere to my dissent expressed in *Baldwin I*, 372 So. 2d 32 (Ala. 1979).

Supreme Court of the United States

No. 84-5743

BRIAN KEITH BALDWIN, PETITIONER,

v.

ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 10, 1984

PETITIONER'S

BRIEF

Office-Supreme Court, U.S.
FILED
FEB 21 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-5743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BRIAN KEITH BALDWIN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Alabama

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QUESTION PRESENTED

1. Whether petitioner's death sentence deprives him of life without due process of law, or denied him equal protection of the laws or constitutes cruel and unusual punishment or violates his Sixth Amendment rights, since the trial court was required by Alabama law to consider the jury's constitutionally invalid mandatory death sentence in the sentencing determination?

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STATEMENT OF THE CASE

Petitioner was tried, convicted and sentenced to death under Alabama's post-*Furman*[1] pre-*Gregg*[2] death penalty statute which was the subject of this court's opinion in *Beck* v. *Alabama*, 447 U.S. 625 (1980).

The trial lasted two days and the principal evidence against petitioner was in the form of statements made by him to various law enforcement officers. He testified during hearings to determine the voluntariness of those statements that he was beaten and threatened by those law enforcement officers prior to the giving of those statements.

The evidence adduced at trial tended to show that petitioner and his co-defendant, Edward Horsley, escaped from a prison camp in North Carolina. While in the process of escape, they were picked up by a sixteen-year-old girl named Naomi Rolon. Petitioner and Mr. Horsley took control of Ms. Rolon's car and drove it from North Carolina through Atlanta to Camden, Alabama with Ms. Rolon in the trunk of her car. In Camden, petitioner, according to the evidence presented, stole a pickup truck which contained a hatchet. Horsley and petitioner then drove in separate vehicles to a secluded spot in Monroe County, Alabama where Ms. Rolon was removed from the car. Horsley ran into Ms. Rolon with her car, and petitioner is alleged to have struck her with a hatchet inflicting a fatal wound. Horsley and Baldwin were then arrested in Lanett, Alabama and eventually returned to Monroe County for trial.[3]

---

[1] *Furman* v. *Georgia*, 408 U.S. 238 (1972).

[2] *Gregg* v. *Georgia*, 428 U.S. 153 (1976).

[3] This statement of facts parallels the facts referenced by the Alabama appellate courts in their opinions. The most recent opinions appear in the Joint Appendix, pp. 20 to 61 .

At the close of the prosecution's case, the defense rested without putting on any evidence. The jury found the petitioner guilty and returned the verdict which the law required:

> We, the jury find the defendant guilty as charged in the indictment and fix his punishment at death by electrocution.

(J.A. 4).

On September 9, 1977, the trial judge held a post-jury verdict sentencing hearing. Prior to the presentation of mitigating evidence, the following exchange took place between the court and petitioner's counsel.

> THE COURT: Mr. Owens [trial counsel for the petitioner], do you have any mitigating circumstances which you would like to offer to the court at this time?
>
> MR. OWENS: Judge, I think perhaps I ought to in view of the situation—put the defendant on the stand and see if I can elicit any mitigating facts from him. I don't have any particular thing in mind, but I ought to give him an opportunity to give any circumstances that might be of benefit to him, and I think that the only way to do that is to put him on the stand.

(J.A. 7).

Petitioner then testified. His testimony established that he came from an extremely difficult family situation. He was forced from his home at the age of thirteen and then made a living "hustling on the street." (J.A. 8). He dropped out of school after finishing the ninth grade. While in prison he became addicted to drugs, and his testimony clearly indicated the strong possibility that he was on drugs at the time of the commission of this offense. (J.A. 10-11). He also established during the post-verdict hearing that he was 18-years-old at the time Ms. Rolon was killed.

Immediately following the hearing, the court sentenced petitioner to death. In so doing, he "accepted the death penalty as fixed by the jury." (J.A. 18). The sole mitigating circumstance found by the court was petitioner's age. It is plain from the record, however, that the trial court understood its consideration of mitigating circumstances to be limited to those enumerated in the statute, thus making petitioner's death sentence unconstitutional when measured by the provisions of this court's decision in *Lockett* v. *Ohio*, 438 U.S. 586 (1978).[4]

The Alabama Court of Criminal Appeals affirmed petitioner's conviction and death sentence in *Baldwin* v. *State*, 372 So.2d 26 (Ala. Cr.App. 1978). That decision was then affirmed by the Alabama Supreme Court. *Baldwin* v. *State*, 372 So.2d 32 (Ala. 1979).

In 1980, this Court vacated the decision of the Alabama Supreme Court and remanded the case to it for further consideration in light of *Beck* v. *Alabama*, 447 U.S. 625 (1980). *Baldwin* v. *Alabama*, 448 U.S. 903 (1980). The Alabama Supreme Court then remanded the case to the Court of Criminal Appeals. Following remandment, the Court of Criminal Appeals initially reversed petitioner's conviction. *Baldwin* v. *State*, 405 So.2d 699 (Ala. Cr.App. 1981). Subsequent to that decision, this Court issued its opinion in *Hopper* v. *Evans*, 456 U.S. 605 (1982). The Court of Criminal Appeals then granted the state's

[4] The mitigating evidence presented by petitioner concerned his troubled youth and his addiction to and use of drugs at the time the crime was being committed. The Alabama statute under which petitioner was sentenced did not contain mitigating circumstance categories through which petitioner's mitigating evidence could be considered, and the trial court believed that his consideration was limited to the statutory categories. (J.A. 18). As a result, there was no meaningful consideration of petitioner's mitigating evidence.

rehearing application, rescinded its prior opinion and affirmed petitioner's conviction and death sentence. *Baldwin* v. *State*, No. 1, Div. 901 (Ala. Cr. App., Nov. 1, 1983).

On July 13, 1984, the Alabama Supreme Court affirmed the decision of the Court of Criminal Appeals upholding petitioner's conviction and sentence of death. *Baldwin* v. *State*, No. 83-276 (Ala. July 13, 1984). The application for rehearing was denied on August 24, 1984. A timely petition for writ of certiorari was granted on December 10, 1984.

SUMMARY OF ARGUMENT

The Alabama death penalty law under which petitioner was sentenced is patently unconstitutional when measured by the standards of the Eighth and Fourteenth Amendments. Under the statute's terms, a defendant found guilty of a capital crime is automatically sentenced to death by the jury without the jury having heard evidence in mitigation. The mandatorily imposed jury death sentence suffers from the vices of other mandatory death sentences such as those struck down by this court in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976) and *Roberts* v. *Louisiana*, 428 U.S. 325 (1976). It is unguided, standardless and reflects a blurred consideration of guilt/innocence and sentence.

The statute then specifically requires the trial judge, who is the final sentencing authority, to take the unguided and standardless mandatory jury sentence of death into account when deciding whether a client should live or die. The plain language of the statute mandates that the trial judge "weigh the aggravating and mitigating circumstances and *fixing the punishment at death by the jury* (emphasis added)" in making his sentencing

determination. Ala. Code, § 13-11-4 (Repealed 1981). The statute thus injects a constitutionally impermissible and totally irrelevant consideration into the capital sentencing process which infects the entire process and which requires that petitioner's death sentence be set aside. *Zant* v. *Stephens*, ___ U.S. ___, 77 L.Ed.2d 235, 255 (1983).

ARGUMENT

The Alabama death penalty statute under which petitioner was convicted and sentenced to death was enacted by the Alabama State Legislature in 1975. Ala. Code § 13-11-9 (1975). The legislature was acting in response to this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), which had struck down a state statute that permitted the death penalty to be imposed without proper guidance to channel sentencing discretion. However, the Alabama death penalty statute was enacted before the important series of decisions rendered by this Court in 1976 which helped to clarify the constitutional standards applicable to statutes authorizing capital punishment. The 1975 Alabama statute, passed as it was without this Court's guidance, is unique and demonstrably unconstitutional.

The 1975 Alabama death penalty statute's sentencing provisions provide that if the jury finds a defendant guilty of a capital offense it shall fix the punishment at death. Ala. Code § 13-11-2(a) (repealed 1981). The sentence of death is mandatory, and the jury can return no other sentence. Although the statute provides for another sentencing hearing in front of the trial judge, the jury is not informed that is is not the final sentencing authority. It is thus led to believe that its sentence will be final. *Beck* v. *Alabama*, 447 U.S. 625, 639 n.15 (1980).

Once a defendant is convicted of a capital offense and automatically sentenced to death by the jury, the trial judge is required to hold a separate sentencing hearing at which he is to consider evidence in aggravation and mitigation. The trial judge then determines whether to sentence the defendant to death or life imprisonment without the possibility of parole. In the language of the statute, "[A]fter weighing the aggravating and mitigating circumstances, [the court] may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole." Or "[t]he court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death." Ala. Code § 13-11-4 (Repealed 1981). As the plain language of the statute makes clear, the trial judge in sentencing is required to take into account the previously announced mandatory jury sentence of death. This requirement, that the judge weigh a mandatory jury sentence that is unguided and standardless infects the 1975 Alabama capital sentencing scheme with fatal constitutional invalidity.

The statute's obvious flaws are underscored by the fact that the statute is no longer in use. Following this court's decision in *Beck* v. *Alabama*, the statute now before this Court was completely rewritten by the Alabama Supreme Court to eliminate the jury's mandatory sentence of death and to provide for a bifurcated trial wherein the jury hears evidence relating to aggravating circumstances before reaching its sentencing decision. *See Beck* v. *State*, 396 So.2d 645 (Ala. 1980).[5] Then in 1981, the

[5] In addition, the sentencing provisions of the 1975 law were declared unconstitutional by the United States Court of Appeals for the Eleventh Circuit in *Ritter* v. *Smith*, 726 F.2d 1505 (11th Cir. 1984).

Alabama legislature enacted an entirely new statute which repealed the 1975 law and incorporated the features of statutes which this court has previously approved. *See* Ala. Code § 13A-5-40 et seq. (1981).

I.

THE ALABAMA CAPITAL SENTENCING SCHEME WHICH REQUIRES THE SENTENCING JUDGE TO CONSIDER AN UNGUIDED AND STANDARDLESS MANDATORY JURY SENTENCE OF DEATH AS A FACTOR IN DETERMINING WHETHER A DEFENDANT SHOULD LIVE OR DIE IS FACIALLY INVALID WHEN MEASURED BY THE STANDARDS OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.[6]

A. The Mandatory Jury Sentence Of Death Which The Statute Requires Be Imposed As A Pre-Requisite To Sentencing Is Unguided, Standardless, Reflects A Blurred Consideration Of Guilt/Innocence And Sentencing Concerns, And Is A Constitutionally Impermissible Factor For Determining Sentence.

Alabama's 1975 death penalty statute forces the jury to regard itself as the final sentencing authority. The jury, therefore, is compelled to consider the "grave" matter of "whether a human life should be taken or spared," *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976), at the same time that it weighs the factual issues of guilt or innocence. Thus, the distinct questions (a) whether a defendant is guilty and (b) whether the appropriate sentence, given the finding of guilt, should be death become inescapably blurred in the minds of Alabama juries. This blurring of such

[6] This brief will address the validity of the 1975 Alabama death penalty law when measured by the Eighth and Fourteenth Amendments to the Constitution of the United States. Although the petition for writ of certiorari also references the Sixth Amendment, no argument will be made that the statute is invalid under that amendment.

critical distinctions not only leads to irrationality and uncertainty in the determination of a defendant's guilt or innocence, but also renders Alabama's *sentencing* procedures unconstitutionally arbitrary and rigid. By failing to provide juries with sufficient information or guidance to make such a momentous decision, the Alabama scheme forces juries to play a hobbled and distorted role in the sentencing process.

The decisions of this Court demonstrate that such a scheme is intolerable. In *Furman* v. *Georgia*, 408 U.S. 238 (1972), this Court began the search for sentencing procedures in capital cases that would protect the dignity of each individual defendant by properly tailoring the punishment to the offender. This continuing search has been animated by the central recognition that "death as a punishment is unique in its severity and irrevocability." *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976); *Furman* v. *Georgia*, 408 U.S. 238, 286-291 (1972). The imposition of such a drastic and irreversible punishment as death must be attended by special care and sensitivity to ensure that every safeguard is observed. *See Powell* v. *Alabama*, 287 U.S. 45, 71 (1932). Indeed, this Court has emphasized "the need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978). *See also Eddings* v. *Oklahoma*, 455 U.S. 104, 110-111 (1982).

Following this Court's 1972 decision in *Furman* v. *Georgia*, a number of state legislatures sought to enact revised death penalty statutes which would comply with the guidelines set in *Furman*. This Court revised five of these statutes in 1976 in a landmark series of decisions which refined and clarified the analysis sketched in

Furman.[7] Of these five statutes, this Court struck down those from North Carolina and Louisiana. This Court observed that those two statutes both responded to *Furman's* concern over unchanneled jury discretion by removing all discretion from juries in capital cases. But as the Court noted, these "mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion." *Woodson* v. *North Carolina*, 428 U.S. 280, 302 (1976). *See also Stanislaus Roberts* v. *Louisiana*, 428 U.S. 325 (1976).

While unbridled jury discretion creates unacceptable arbitrariness in the imposition of capital sentences, mandatory sentencing offers no solution to the problems of arbitrariness identified in *Furman* and, indeed, presents its own distinct set of dangers. As this Court explained, the "failure [of mandatory sentencing] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death," (*Woodson* v. *North Carolina*, 428 U.S. at 303) creates an unduly harsh and unworkably rigid system of punishment that violates the Eighth Amendment.

Thus, sentencing decisions made under a mandatory scheme are bound to be irrational. This is because the jury either will reject a guilty verdict even where the defendant's guilt is well-established because of its concerns about the death penalty, or will impose the death sentence indiscriminately on defendants without regard to the offender's individual character and record. In sum, a sentencing scheme that replaces unfettered discretion

[7] *See Gregg* v. *Georgia*, 428 U.S. 153; *Proffitt* v. *Florida*, 428 U.S. 242; *Stanislaus Roberts* v. *Louisiana*, 428 U.S. 325; *Woodson* v. *North Carolina*, 428 U.S. 280; *Jurek* v. *Texas*, 428 U.S. 262.

with a mandatory system completely fails to provide the "constitutionally indispensable" consideration "of the character and record of the individual offender." *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976).

In the landmark opinion in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Court explained that the best answer to these concerns is found in the middle ground between standardless discretion and mandatory sentencing. *Id.* at 190-192. This Court stated explicitly that the concerns expressed in *Furman* "are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence an provided with standards to guide its use of the information." *Id.* at 195.

Alabama's statute departs so drastically from this middle ground that it cannot withstand constitutional scrutiny. Although, this Court in *Beck* v. *Alabama* was not required to reach the constitutionality of the mandatory jury sentencing aspect of Alabama's statute, the Court did expressly consider this portion of the statute in the course of reviewing the constitutionality of the preclusion clause. This Court left no doubt that it regarded this portion of the statute to be as defective as the preclusion clause.

> The Alabama statute, which was enacted after *Furman* but before *Woodson*, has many of the same flaws that made the North Carolina statute unconstitutional. Thus, the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, *without giving the jury any standards to guide its decision on this issue.*

Id. at 640 (emphasis added).

Thus, beyond simply distorting the guilt phase, the mandatory sentence provision allows the jury to consider the propriety of a sentence of death without full information, careful guidance and focused, prudent review. In that sense, the Alabama statute harbors the same constitutional vices as the North Carolina statute. As this Court observed in *Woodson* v. *North Carolina:*

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. *It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.*

Id. at 304 (emphasis added).

Alabama juries are necessarily torn between the frustration, on one hand, of attempting to treat each offender as a unique individual, but without sufficient information, guidance or discretion to render a proper sentence, and the temptation, on the other hand, of treating all convicted defendants as simply a faceless mass on which the sentence of death must be inflicted indiscriminately. As this Court stressed in *Woodson* and *Roberts* this kind of tension, and the uncertainty and unreliability which it spawns is intolerable in a capital case. Because "the penalty of death is qualitatively different from a sentence of imprisonment . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). Alabama's system fails to provide that necessary

degree of guidance and reliability and the result is a constitutionally chaotic scheme which makes a constitutionally impermissible factor, i.e., a mandatory sentence of death, an indispensable part of the sentencing process.[8]

B. The Alabama Death Penalty Statute Requires The Sentencing Judge To Weigh The Constitutionally Impermissible Mandatory Sentence Of Death Along With The Other Aggravating And Mitigating Circumstances, Thus Creating A Capital Sentencing Scheme Which Violates The Eighth And Fourteenth Amendments.

As previously noted, the trial judge, in determining sentence under the Alabama capital sentencing scheme, is required to weigh not only the aggravating and mitigating circumstances presented by a case, but also the "fixing of the punishment at death by the jury." Ala. Code § 13-11-4 (Repealed 1981). Thus, at the very beginning of the sentencing hearing, the judge has before him not only a jury verdict of guilty, but also a jury determination that death is the appropriate punishment. This fact alone injects a wholly unconstitutional ingredient into the sentencing judge's consideration—namely, a jury sentence of death which is not based on an exercise of informed or channeled discretion. But Alabama goes further. The statute requires the judge to weigh the completely mandatory and totally standardless jury sentence of death in addition to his consideration of aggravating

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[8] As the United States Court of Appeals for the Eleventh Circuit noted in *Ritter* v. *Smith*, 726 F.2d 1516 (11th Cir. 1984),

> Because the mandatory death sentence as a statutorily required factor to be considered in the sentencing process is a factor which is unguided and standardless, reflects no individualized consideration of the particular defendant or crime, and is irrelevant to the sentencing process, we hold; that it is a constitutionally impermissible factor in Alabama's capital sentencing scheme.

and mitigating circumstances. The constitutionally impermissible factor of the jury's mandatory death sentence must be given weight in the judge's own sentencing decision.

The Alabama Supreme Court, nonetheless rejected the constitutional challenge to the statute. It did so in spite of the warnings of unconstitutionality broadcast by this Court's decision in *Beck* v. *Alabama* and in spite of the fact that it has rewritten the Alabama death penalty law to eliminate the provisions which it now seeks to uphold. In a vain attempt at principled jurisprudence, the court noted that:

> The statute is saved by the fact that the court which is the sentencing authority, considers the circumstances of the particular offense and the character of the offender, i.e., the aggravating and mitigating circumstances, in a separate and independent sentencing hearing, and then imposes sentence.

Baldwin v. *State*, No. 83-276 (Ala. July 13, 1984), slip op. p.17. The opinion however, omits the crucial factor that the trial judge must also weigh the standardless and unguided jury sentence of death before determining the appropriate penalty. In so doing, the court ignores the very flaw which kills the statute. It does not, and cannot answer the constitutional objection which this case presents. The Alabama statute requires the trial judge to consider, as a factor in the sentencing process, a mandatory jury sentence of death, which is unguided and standardless, reflects no individualized consideration of the particular defendant or crime and is irrelevant to the sentencing process. It is patently unconstitutional.

Indeed, the Alabama legislature has impermissibly "stacked the deck" in favor of death. *Witherspoon* v. *Illinois*, 391 U.S. 510, 523 (1968). By requiring the trial

judge to incorporate into his sentencing decision a wholly unconstitutional and ineradicable ingredient—namely, the jury's death sentence which is not based on a full consideration of mitigating and aggravating factors—the statute prevents any meaningful review of sentencing information by the trial judge. The statute so narrowly confines the trial judge's exercise of sentencing discretion that this constitutionally fundamental review of the defendant's character and record becomes a charade. The evils of mandatory sentencing without full information or guidance are carried through to the judge's final sentencing decision and thereby render that final decision an unacceptable means of determining who is to live and who is to die. This Court in *Beck* made this point clearly:

> *[I]t is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did.* Indeed, according to statistics submitted by the State's Attorney General, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate hearing in aggravation and mitigation before he imposes sentence.

Id., at 646 (footnote omitted), (emphasis added).

The Supreme Court's decision in *Proffitt* v. *Florida*, 428 U.S. 242 (1976), is also instructive on this point. There this Court considered Florida's death penalty sentencing procedures in which a jury renders an advisory sentence that is reviewed by the trial judge.[9] Finding that these procedures presented "an informed, focused, guided and objective inquiry into the question whether [a

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[9] Under the Florida system, if a defendant is found guilty of a capital offense, then a separate evidentiary hearing is held before the trial judge and the jury to determine his sentence. At the conclusion

defendant convicted of a capital offense] should be sentenced to death," the Court upheld the Florida death penalty statute. *Id.* at 259.

At first glance, the Alabama system appears to resemble the Florida scheme upheld in *Proffitt*. However, that resemblance is only superficial. Upon close inspection, the Florida procedures approved by the Court are distinct in several fundamental respects from Alabama's flawed system, and indeed, the Florida scheme, far from providing support for Alabama's sentencing procedures, demonstrates that the Alabama system must be condemned.

Under the Florida system, the jury is permitted to offer a truly "advisory" recommendation. This advice is informed by the evidence introduced at the separate sentencing hearing and is sharpened by detailed guidance concerning mitigating and aggravating factors. The Florida jury has a real choice between life imprisonment or death. In addition, the Florida sentencing judge must give special weight to a jury recommendation that life imprisonment is warranted: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Proffitt* v. *Florida*, 428 U.S. 242, 249 (*quoting Tedder* v. *State*, 322 So.2d 908, 910 (1975)). In Alabama, of

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of the hearing, the jury is directed to consider whether certain statutorily enumerated mitigating circumstances outweigh the aggravating circumstances, and "based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." *Proffitt*, *supra*, 428 U.S. at 248. The jury's sentence is only advisory; the actual sentence is determined by the trial judge who must also weigh the mitigating factors against the aggravating factors. *Id.* at 249-250.

course, the trial judge will *never* have the opportunity to weigh such a jury recommendation favoring life imprisonment because the system precludes a jury from rendering such a verdict.

By contrast to Florida's scheme, the Alabama jury, although it is required to make a sentencing as well as a guilt determination, receives *no* guidance, and has *no* discretion to choose intelligently between life or death. And yet, despite these limitations, the trial judge is compelled to consider the jury's "fixing of the punishment at death" in making his final sentencing decision. The distortions which that requirement injects into the sentencing process renders Alabama's scheme unconstitutional.

The Florida legislature, by allowing the jury to express its opinion to the sentencing authority, has clearly sought "to maintain a link between contemporary values and the penal system," *Witherspoon* v. *Illinois*, 391 U.S. 510, 519, n.15 (1968). But Alabama has made such a link illusory. Its juries are not free to express community values and its sentencing judges are required to incorporate the jury's automatic sentence into his sentencing deliberations. The net effect of this remarkable procedure is to perpetuate all of the evils of mandatory sentencing identified in *Woodson* without providing a truly reliable mechanism to guard against or limit those evils. A careful consideration of "the uniqueness of the individual" *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978) is made impossible. Alabama has thereby ignored "the fundamental respect for humanity underlying the Eighth Amendment [which] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976).

C. The Unconstitutionality Of Petitioner's Death Sentence Is Not Altered By The Fact That The Alabama Appellate Courts May Have Also Weighed The Aggravating And Mitigating Circumstances.

In its "Brief in Concurrence with the Certiorari Petition" the state argues that the death sentence in this case is saved from unconstitutionality by the fact that the Alabama appellate courts may have also weighed the aggravating and mitigating factors and independently concluded that the sentence of death was appropriate. Even assuming without conceding that such a weighing process occurred, petitioner's death sentence is nonetheless unconstitutional.

In support of its contention that the imposition of a death sentence upon petitioner under an invalid sentencing scheme is constitutional, the state relies on this Court's decision in *Wainwright* v. *Goode*, ___ U.S. ___, 78 L.Ed.2d 187 (1983), a plurality opinion which held that a death sentence based in part on an aggravating circumstance not authorized by state law is not unconstitutional. The decision in *Wainwright* v. *Goode* however, must be analyzed in the light cast by this Court's decision in *Zant* v. *Stephens*, ___ U.S. ___, 77 L.Ed.2d 235 (1983). When that analysis occurs, it is plain that the petitioner's death sentence cannot stand.

As the state correctly notes, this Court's previous jurisprudence indicates that the use of an illegal sentencing factor does not automatically invalidate the death sentencing process. In *Wainwright* v. *Goode*, *supra* and *Barclay* v. *Florida*, ___ U.S. ___, 77 L.Ed.2d 1134 (1983), for example, this Court held that the use of an aggravating factor which was illegal under state law, but which was not federally unconstitutional did not require invalidation of an otherwise valid death sentence. Likewise, in *Zant* v. *Stephens*, ___ U.S. ___, 77 L.Ed.2d 235 (1983), this Court found that use of a sentencing factor which was illegal under the federal constitution did not invalidate the death sentencing process if the underlying evidence introduced by the invalid factor was admissible at the sentencing hearing both under state law and the United States Constitution. This Court in *Zant* was careful, however, to point out that there is a third category of sentencing factors which are per se unconstitutional. The use of a factor in this third category automatically invalidates the sentencing process.

The boundaries of this third category are clearly marked by the *Zant* opinion. According to that holding, a state may not use as a sentencing factor supporting a death sentence,

> . . . [f]actors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as, for example, the race, religion or political affiliation of the defendant (citation omitted), or to conduct which actually should militate in favor of a lesser penalty, such as, perhaps the defendant's mental illness.

Zant v. *Stephens*, 77 L.Ed.2d at 255. The constitution requires that a death sentence based on the type of sentencing factor in this third category must be set aside. *Id.*

The jury mandatory sentence of death which is at issue here is clearly the kind of sentencing factor whose use requires automatic reversal. It is a constitutionally impermissible factor which injects irrelevant consideration into the capital sentencing process, and thus unconstitutionally infects it. Petitioner is entitled to have his death sentence vacated.

CONCLUSION

The judgment of the Alabama Supreme Court, insofar as it affirmed petitioner's sentence of death, should be reversed.

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BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BRIAN KEITH BALDWIN,
Petitioner

v.

STATE OF ALABAMA,
Respondent

On Writ of Certiorari to the Alabama Supreme Court

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Are death sentences imposed under Alabama's 1975 capital punishment statute unconstitutional because of the guilt stage verdict form requirement, even though: a) that requirement served a limited but important function; b) no sentencing decision was made except by the trial court judge following a separate and independent hearing into aggravating and mitigating circumstances; and c) the sentencing process was attended by numerous safeguards, including independent appellate review of the aggravating and mitigating circumstances to determine the propriety of the death sentence?

PARTIES

The caption contains the names of all the parties.

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IN THE

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BRIAN KEITH BALDWIN,
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STATE OF ALABAMA,
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On Writ of Certiorari to th Alabama Supreme Court

BRIEF FOR RESPONDENT

OPINIONS BELOW

1. The initial opinion of the Alabama Court of Criminal Appeals affirming petitioner's conviction and sentence is reported as *Baldwin v. State*, 372 So.2d 26 (Ala. Cr. App. 1978); and the opinion of the Alabama Supreme Court affirming that decision is reported as *Baldwin v. State*, 372 So.2d 32 (Ala. 1979).

2. The opinion of the Alabama Supreme Court remanding the case to the Alabama Court of Criminal Appeals for further consideration, following this Court's remand in *Baldwin v. Alabama*, 448 U.S. 903 (1980), is reported as *In the Matter of Baldwin*, 405 So.2d 698 (Ala. 1981).

3. The initial opinion of the Court of Criminal Appeals following remand, in which it reversed petitioner's

conviction and sentence, is reported as *Baldwin v. State*, 405 So.2d 699 (Ala. Cr. App. 1981). The opinion in which that court thereafter granted the State's rehearing application, set aside the reversal, and affirmed petitioner's conviction and sentence is reported as *Baldwin v. State*, 456 So.2d 117 (Ala. Cr. App. 1983). It is reproduced in the Joint Appendix at 20-41.

4. The opinion of the Alabama Supreme Court affirming that Court of Criminal Appeals decision and reaffirming petitioner's conviction and sentence is reported as *Ex parte Baldwin*, 456 So.2d 129 (1984). It is reproduced in the Joint Appendix at 42-61.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. § 1257(3), and the petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The petitioner has made arguments concerning the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment:

> nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The petitioner has also made arguments concerning the Cruel and Unusual Punishments Clause of the Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. The issues in this case involve Alabama's 1975 capital punishment statute, *Code of Alabama* 1975, § 13-11-1 through § 13-11-9, a copy of which is attached to the certiorari petition.

STATEMENT OF THE CASE

The Crime

On Saturday evening, March 12, 1977, sixteen-year-old Naomi Rolon left her home in Hudson, North Carolina to visit her father who was in a local hospital. (R. 34-35, 37) She was abducted en route by petitioner and another criminal named Edward Horsley.[1] Earlier that night petitioner and Horsley had escaped from a Hudson, North Carolina prison camp, where petitioner was serving a sentence for robbery. (St. Ex. 10 at 1-2, R. 199; St. Ex. C, R. 253)[2]

When petitioner and Horsley first saw Naomi Rolon's car, it was stopped on the side of the highway. They walked up and asked her for a ride. She told them she couldn't give them one, that she was having trouble with the brakes, and that someone had already gone for help. She had opened the car door when they walked up "like she wanted to know what we wanted," and after she refused to give them a ride petitioner shoved her over and got in on the driver's side. (St. Ex. A at 1-4, R. 252)[3]

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[1] The initial state appellate court opinion in this case summarized the facts concerning the crimes, *Baldwin v. State*, 372 So.2d 26 (Ala. Cr. App. 1978), and that summary was adopted verbatim in later opinions, *Baldwin v. State*, 372 So.2d 32, 33 (Ala. 1979); *Baldwin v. State*, 456 So.2d 117, 119 (Ala. Cr. App. 1983) (J.A. 21). That summary gives the date of the abduction as November 25, 1976, which was actually the date of the victim's sixteenth birthday. (R. 34). It was undisputed at trial that the date of the abduction was March 12, 1976. (R. 34-37, 45-49, 74-80, 274) *See also, Horsley v. State*, 374 So.2d 363, 365 (Ala. Cr. App. 1978).

[2] The documentary exhibits introduced at trial were not incorporated into the trial transcript but were made a separate part of the record on appeal. (R. 273) Those exhibits have been transmitted to this Court by the state appellate court clerk.

[3] There is nothing to support petitioner's assertion that the young victim "picked up" Horsley and him, except petitioner's own self-

After petitioner and Horsley took control of her car, Naomi Rolon was scared and asked them to let her out. (St. Ex. A at 5, R. 252) Instead, they turned the car around, began to drive to Charlotte, North Carolina, and "[w]e told her we were gonna give her some when we get there." (St. Ex. A at 4-5, R. 252) Approximately two hours later, when they arrived in Charlotte, they drove Naomi to a parking lot and began fondling her. (St. Ex. A at 4-6, R. 252) When she would not let Horsley take her clothes off, he and petitioner hit her until she let them remove her clothes. (St. Ex. A at 6, R. 252) They then laid her down in the front seat and tried to rape her. The sixteen-year-old victim told them she was a virgin, and fought the two men ferociously, kicking, pinching, and biting them, and trying to scream. (St. Ex. A at 7-8, R. 252) Eventually, one or both of them succeeded in raping her. (R. 221-222) Urged on by Horsley, petitioner told Naomi to commit an act of oral sodomy on him, but she refused. Petitioner then grabbed her by the head and forced her to do it. (St. Ex. A at 25-26, 33)

Afterwards, while petitioner was driving the car down the streets of Charlotte, he told Horsley to choke Naomi, who was then lying in the seat. Horsley tried to choke her, but "she started kicking and crying again." Petitioner drove the car behind a building where they took turns choking Naomi until "she went limber." They then took her out, laid her down, ran over her with the car, and then locked her in the trunk. (St. Ex. A at 9-10, R. 252)

Petitioner drove to a service station to buy gas, but they had to leave hurriedly because petitioner heard Naomi move in the trunk. After they drove to a more

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serving statement (St. Ex. 10 at 2-3, R. 199), which conflicts with Horsley's admissions (St. Ex. A at 1-4, R. 252). *See also, Baldwin v. State*, 456 So.2d 117, 119 (Ala. Cr. App. 1983) (J.A. 21); *Horsley v. State*, 374 So.2d 363, 365 (Ala. Cr. App. 1978).

remote spot, Horsley got out, opened the trunk, and stabbed Naomi in the stomach with a pocket knife. (St. Ex. A at 10-11)

Later, as petitioner and Horsley drove towards King's Mountain, North Carolina, they heard Naomi call out from the trunk. They pulled off the highway, petitioner took a knife, opened the trunk and "cut her." (St. Ex. A at 15-19, R. 252)

By then, it was Sunday morning, March 13. Petitioner and Horsley drove all day Sunday, stopping to buy gas and something to eat, using money taken from Naomi's purse. They spent Sunday night in Atlanta, Georgia. Before leaving Atlanta, they threw Naomi's clothes in a garbage can at a shopping center. During this entire time, sixteen-year-old Naomi Rolon lay nude, wounded, and blood-soaked in the trunk of the car. (St. Ex. A at 12-14, 19-20, R. 252; J.A. 21)

On Monday, March 14, petitioner and Horsley drove from Atlanta into Alabama and began looking for another vehicle to steal. Finally, they found an El Camino truck with its doors unlocked and the keys in it. (St. Ex. A at 20-21, R. 252) They stole the truck between 2:00 and 3:00 p.m. that Monday afternoon. (R. 40-42) Petitioner drove it off while Horsley drove Naomi Rolon's car with her still in the trunk. (St. Ex. A at 20-21, R. 252) They went to a secluded side road in Monroe County, (R. 52, 78-79; St. Ex. A at 22, R. 252), and as Horsley later described it:

> We pulled up in there, and Brian was behind me. And he got out of the El Camino. Uh, took the key he had and opened the truck [sic] and helped the girl out. When he let her out, he stepped back and I was supposed to run over her. I tried to back up over her but I missed her and she ran, stumbled up in those woods where she was cut at. Stumbled up in there and laid there, and was trying to moan or something. I turned the car around and ran up into her. I still didn't kill her. I tried to back it out.

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> I couldn't back it out, so he went up in there with the hatchet and cut her, and we took the tag off the car, and we left and was going out and some bushes got stuck up under the El Camino, and we stopped out there on the pavement of the road and took them off and I got this scratch on my finger. And we got '3m [sic] from under there.

(St. Ex. A at 32, R. 252) Horsley also said that as petitioner was preparing to kill Naomi with the hatchet petitioner told her: "Move your hand so I can get this over with." (J.A. 16); *accord*, *Horsley v. State*, 374 So.2d 363, 365 (Ala. Cr. App. 1978).

Petitioner himself described Naomi's murder this way:

> I opened the trunk of her car and told her to get o[illegible]. She stumbled out and fell in the pine tops. E[illegible]ward ran into her with the car. I didn't think she was dead so I cut her throat with the hatchet. Edward stabbed her in the side with her knife. She was laying in the pine tops bleeding and we left in the El Camino.

(St. Ex. 12, R. 138) It was petitioner's hatchet blow to her neck that killed Naomi. (R. 218-221, 229) Her ordeal and suffering had lasted 40 hours. (J.A. 16)

On March 15, 1977, following a high speed chase, petitioner and Horsley were apprehended in the stolen truck in another county. (R. 42-45, 47) They were returned to Wilcox County, where the truck had been stolen. (R. 49-51) While in custody, petitioner gave a number of incriminating statements, and on Wednesday, March 16, 1977, petitioner led law enforcement officers to Naomi Rolon's body in Monroe County. *Baldwin v. State*, 372 So.2d 26, 28-30 (Ala. Cr. App. 1978); (R. 203).

The Trial and Sentence Proceedings

On April 20, 1977, petitioner was indicted by the Monroe County Grand Jury for the *Code of Alabama* 1975, § 13-11-2(a)(2) capital offense of robbery during the course of which the victim was intentionally killed. (J.A. 2) At arraignment he pleaded not guilty. (R. 282)

The case was tried before a jury on August 8-9, 1977. (R. 304) The State's evidence at trial included: testimony about an oral statement petitioner had made (R. 75-77, 148-150); a taped statement petitioner had given to law enforcement officers (St. Ex. 9, R. 125); the transcript of it (St. Ex. 10, R. 199); and a written statement petitioner had signed in which he admitted killing Naomi Rolon with a hatchet (St. Ex. 12, R. 138). The State also proved that: the license plate from Naomi Rolon's car was found in the front seat of the stolen truck in which petitioner was apprehended (R. 36, 46-49, 74-75, 126); her car keys were in petitioner's shirt pocket (R. 50-53, 126, 154-157, 210-213); petitioner's fingerprints were found inside her car (R. 54-55, 141, 142, 155, 222-226); and it was petitioner who led the officers to her "horribly mutilated body" (R. 77-81, 88-89, 150-154, 171-176). *Baldwin v. State*, 372 So.2d 26, 31 (Ala. Cr. App. 1978).

Petitioner offered no evidence during the guilt stage, except his own testimony that his incriminating statements were coerced. Four law enforcement officers and three other witnesses testified to the contrary. *See*, *Baldwin v. State*, 372 So.2d at 28-30. The trial court ruled that petitioner's statements were voluntarily made after a knowing waiver of rights (R. 81-82, 124, 138), and the Court of Criminal Appeals later agreed, *Baldwin v. State*, *supra*. In considering the matter, the state appellate court itself listened to petitioner's tape-recorded confession (St. Ex. 9, 125), and said:

> We have listened to the tape recording of the appellant's confession and from inflections in his voice, the matter-of-fact and almost casual manner in which he relates the events, we are unable to detect even a hint of coercion. In fact, the appellant re-

lates his part in the kidnapping, attempted strangulation, stabbing, attempted murder with the automobile, and the final act of slaughtering his helpless victim with no more emotion than if he had been describing the fixing of a flat tire on his automobile. The tape recording of the appellant's confession leaves one with the impression that *he felt no remorse over the fact that he and his companion had treated this unfortunate, innocent victim with a brutality not found in animals and had mercilessly slaughtered this defenseless young girl.*

Baldwin v. State, 372 So.2d at 30 (emphasis added).

Following jury instructions to which petitioner took no exception (R. 247), the jury returned a verdict convicting him of the capital offense. As required by *Code of Alabama* 1975, § 13-11-2(a), the guilty verdict form which was submitted to and returned by the jury read: "We, the Jury, find the defendant guilty as charged in the indictment, and fix his punishment at death by electrocution." (J.A. 4)

The trial judge then informed petitioner, consistently with §§ 13-11-3 and 4, that:

> Let me say this: The jury has found you guilty of the crime of robbery with the aggravated circumstances of intentionally killing the victim and under their oaths, they have re-returned a verdict of guilty in your case and set your punishment at death by electrocution but the law of this state provides first that there will be an additional hearing in this case at which time the Court will consider aggravating circumstances, extenuating and all other circumstances, concerning the commission of this particular offense.
>
> The Court at that time is either authorized to let the sentence of death be carried into execution or to reduce it from death by electrocution to life imprisonment without parole but that's another matter

> with which this Court will be concerned at another time. . . .

(R. 249-250) The trial court contemporaneously entered a formal written judgment adjudicating petitioner guilty pursuant to the jury's verdict, but noted in lieu of any sentence: "Hearing on aggravation, extenuation and mitigation continued to a future date." (R. 306) On August 16, 1977, one week after the trial, the court entered an order setting September 9, 1977 "as the day on which the court will hold a hearing to aid in the determination of whether or not the Court will sentence the defendant to death or to life imprisonment without parole." (J.A. 5)

In its introductory comments at the September 9, 1977 sentence hearing, the court said: "The purpose of this hearing, of course, is to determine whether or not the Court will sentence Brian Keith Baldwin to death or to life imprisonment without parole." (J.A. 6) For proof of aggravating circumstances under § 13-11-6, the State introduced Horsley's statement concerning the details of the crime, petitioner's juvenile record, and petitioner's adult criminal record. (J.A. 6-7) The State also incorporated the guilt stage evidence relevant to the aggravating circumstances. (J.A. 7)

Petitioner took the stand in his own behalf in an attempt to establish mitigating circumstances and testified that: he had left home at the age of thirteen because he could not get along with his father who would not let him stay out late at night (J.A. 8, 11); he had finished the ninth grade before he was "terminated" for fighting another student who would not pay him money (J.A. 9, 12-13); he had been arrested about thirty times (J.A. 10); he had fought a lot at school and in various jobs (J.A. 11-13); he had sold drugs and had been addicted to them (J.A. 10-13); and he had been eighteen when he murdered Naomi Rolon (J.A. 15). In regard to that crime, petitioner said: "I ain't saying I'm guilty but I might be guilty for murder but I ain't guilty for robbery

down here. That's all I got to say." (J.A. 13) Petitioner never once expressed any remorse. (J.A. 8-19)

Throughout the sentence proceedings the trial court displayed a sincere desire to be informed of all mitigating circumstances, every reason that might indicate a sentence less than death was appropriate. (J.A. 7, 10, 12, 14, 15) For example, after petitioner's counsel finished questioning him, the trial court continued the inquiry, explaining:

> THE COURT: Brian Keith Baldwin, today is the day you have in court to tell this judge whatever is on your mind and as Mr. Owens has told you, now is your time to tell the judge anything that you feel like might be helpful to you in the position that you find yourself in. I want to give you every opportunity in the world that I know about.
>
> MR. BALDWIN: You mean problems in growing up and stuff?
>
> THE COURT: Anything you feel like you can tell this Judge that will help you in your present position.

(J.A. 12) *See also, Baldwin v. State*, 372 So.2d at 31.[4]

After all the evidence had been presented, the court heard argument about whether it should sentence petitioner to death or to life imprisonment without parole. The State's argument stressed the forty hours of suffering the victim had undergone at petitioner's hands, while petitioner's attorneys stressed his age and "hard life." (J.A. 15-16)

After a recess, the trial court judge returned to announce his sentence findings and impose sentence. The

[4] Contrary to the implication in petitioner's brief, his counsel had prepared for the sentence hearing and had investigated mitigating circumstances. Counsel's efforts were made difficult by the refusal of petitioner's estranged family to cooperate. (J.A. 14) In any event, no ineffective assistance issue is before this Court.

court found four § 13-11-6 aggravating circumstances: that petitioner had committed the capital offense while he was under sentence of imprisonment; that petitioner had been previously convicted of a felony involving the use of violence to the person; that the capital offense involved robbery or flight after robbery; and that the capital offense was especially heinous, atrocious, or cruel. (J.A. 18-19) The court found that the only § 13-11-7 mitigating circumstance was petitioner's age at the time of the offense. The court considered petitioner's non-statutory mitigating circumstance evidence but was not convinced by it.[5]

After listing the aggravating and mitigating circumstances it found convincing, the court said:

> The Court having considered the aggravating circumstances and the mitigating circumstances and

[5] Contrary to the assertion in petitioner's brief, the trial court did not think that its consideration of mitigating circumstances was limited to the § 13-11-7 statutory categories. Alabama law clearly requires the sentencing judge to consider all non-statutory mitigating circumstances, see p. 28 of this brief, below, and the trial judge in this case plainly understood that, as his comments during the sentence hearing indicate (J.A. 10, 12, 14). *See, Baldwin v. State*, 372 So.2d 26, 31-32 (Ala. Cr. App. 1978).

"[M]itigation may be in the eye of the beholder," *Stanley v. Zant*, 697 F.2d 955, 969 (11th Cir. 1983) (footnote omitted), *cert. denied*, 104 S.Ct. 2667 (1984), and "[w]hat one person may view as mitigating, another may not," *Dobbert v. Strickland*, 718 F.2d 1518, 1524 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 3591 (1984). While a sentencing authority is required to consider mitigating circumstance evidence, it is not required to find that a specific circumstance is actually mitigating in any particular case. *E.g., Dobbert v. Strickland, supra*; *Shriver v. Wainwright*, 715 F.2d 1452, 1457-1458 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 1328 (1984). Here, the sentencing judge solicited and considered the broadest range of mitigating circumstance evidence, but found it unconvincing.

In any event, there is no non-statutory mitigating circumstance issue before this Court.

> after weighing the aggravating and mitigating circumstances, it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the jury should be and is hereby accepted.

(J.A. 18)

The State Appellate Decisions

The Alabama Court of Criminal Appeals initially affirmed petitioner's conviction and death sentence. *Baldwin v. State*, 372 So.2d 26 (1978), and the Alabama Supreme Court affirmed that decision. *Baldwin v. State*, 372 So.2d 32 (1979). However, this Court vacated that judgment and remanded the case for further consideration in light of the *Beck v. Alabama*, 447 U.S. 625 (1980), decision. *Baldwin v. Alabama*, 448 U.S. 903 (1980). The Alabama Supreme Court, in turn, remanded the case to the Alabama Court of Criminal Appeals, *In the Matter of Baldwin*, 405 So.2d 698 (Ala. 1981).

After remand, the Court of Criminal Appeals initially entered a judgment reversing petitioner's conviction. *Baldwin v. State*, 405 So.2d 699 (1981). However, after this Court's decision in *Hopper v. Evans*, 456 U.S. 605 (1982), the Court of Criminal Appeals granted rehearing and issued a new opinion reaffirming petitioner's conviction and sentence. *Baldwin v. State*, 456 So.2d 117 (1983) (J.A. 20-41). The Alabama Supreme Court affirmed that decision. *Ex parte Baldwin*, 456 So.2d 129 (Ala. 1984) (J.A. 42-61).

During the appellate process, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court reviewed the sentencing decision, independently reweighed the aggravating and mitigating circumstances, and concluded that death was the appropriate sentence in this case. *Baldwin v. State*, 456 So.2d 117, 123-128 (Ala. Cr. App. 1983) (J.A. 37-38); *Ex parte Baldwin*, 456 So.2d 129 (Ala. 1984) (J.A. 58).

SUMMARY OF ARGUMENT

Alabama's 1975 capital punishment statute, under which petitioner was sentenced to death, contains a jury verdict form provision. Under that provision the guilty verdict form submitted to the jury contains language which "fix[es] the punishment at death." However, the statute is not a mandatory death penalty act. The jury is not the sentencing authority, and no sentence exists until the judge decides on one after weighing all the aggravating and mitigating circumstances at a separate and independent sentence hearing conducted after the jury is discharged. Approximately one-third of the defendants convicted of capital offenses under the statute were sentenced to life imprisonment without parole, instead of death.

Capital offenses are narrowly defined to include only specific types of intentional killing homicides committed under significant aggravated circumstances. Accordingly, a verdict of guilty necessarily reflects not only a jury finding beyond a reasonable doubt that the defendant committed an intentional killing homicide but also a finding that he did so under circumstances which aggravated the crime and set it apart from other intentional killing homicides. For example, in this case the definitional aggravating circumstance was that the intentional killing had occurred during a robbery and involved the victim of that robbery. The substantive advice the jury verdict form conveys from the jury to the sentencing judge is limited to non-binding advice that the definitional aggravating circumstance exists.

Through the verdict form provision the legislature uses the jury to procedurally convey to the sentencing judge an important legislative judgment about punishment. The legislative judgment is that if the definitional aggravating circumstance does exist the punishment should be death, unless there are one or more mitigating circumstances to offset or counterbalance that and any other aggravating circumstances. The constitutionality of that legislative

judgment is established by *Proffitt v. Florida*, 428 U.S. 242 (1976), which upheld a statute which had been construed to effect a similar judgment, *e.g.*, *id.*, at 260 (concurring opinion of White, J.). The capital punishment statutes of fifteen other states embody a similar legislative judgment.

The jury's action in respect to "fix[ing] the punishment at death" is purely ministerial. It makes no decision about punishment. The jury is given no discretion about the matter; all the discretion is with the judge. The fact that the statute may appear from the jury's perspective to be a mandatory death penalty act could not have harmed petitioner or anyone else tried under it. The historical evidence uniformly establishes and all the authorities agree that if an apparently mandatory death penalty provision has any effect at all on the jury, it makes the jury more reluctant to convict. However, no unjust acquittals have skewed the sentencing pattern under this statute.

After the jury convicts the defendant, the trial judge holds a sentencing hearing. There are some limitations on the evidence the prosecution can present, but the defendant may present any probative evidence relevant to any statutory or non-statutory mitigating circumstance. After the hearing, the judge determines whether he concurs with the advisory finding that the definitional aggravating circumstance is present. If he does not concur, there can be no death penalty. If he does concur, and there are no statutory or non-statutory mitigating circumstances, the sentence is death because there is a reason to impose the death penalty and no reason not to do so. If the judge finds any mitigating circumstance at all, he decides upon the proper sentence by weighing the definitional aggravating circumstance and any other statutory ones against all the mitigating circumstances. No numerical weights are assigned to the circumstances, and the final decision is in the judge's discretion.

While the statute requires the judge to consider or weigh the jury's verdict, containing the formal language fixing the penalty at death, it does not require the judge to treat it as though the jury has made a sentencing recommendation. The jury did not consider any mitigating circumstances or any statutory aggravating circumstance other than the definitional one. The judge knows that. The judge also knows that the jury had no discretion about the language contained in its verdict form. What the statute requires, and what the judge does, is to weigh the substantive advice implicit in the verdict that the definitional aggravating circumstance is present and to consider the previously discussed legislative judgment reflected in the verdict language.

From the judge's perspective, the legislature is saying in the verdict form provision that the punishment for an intentional killing homicide accompanied by a serious aggravating circumstance should be death unless there is some reason (mitigating circumstance or circumstances) in the case to make the judge think otherwise. The jury did not make that judgment; the legislature did. The jury's verdict language, prescribed by the legislature, simply conveys the legislative judgment.

If the judge finds that the definitional aggravating circumstance does not exist, or if in his judgment the aggravating circumstances are offset or counter-balanced by mitigating circumstances, he sentences the defendant to life without parole. In doing so, the judge necessarily "rejects" or "reduces" the preliminary punishment the legislature set in the purely formal verdict language. If the judge finds that the definitional aggravating circumstance exists and if in his judgment there are insufficient mitigating circumstances to offset it, he sentences the defendant to death. In doing so he necessarily "accepts" the preliminary punishment the legislature set in the verdict form language. He has the authority and the duty to make the actual sentencing decision and thereby "ac-

cept" or "reject" the punishment contained in the verdict form. The statute plainly says so.

If the judge decides the appropriate sentence is death, his decision is not final. An enhanced appellate review of the sentence hearing and sentence findings is conducted to determine whether any error or arbitrary factor influenced the sentence. In addition, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court review the sentence decision itself. This review not only includes review by comparison with sentences in similar cases, but also includes an independent reweighing of aggravating and mitigating circumstances in which the appellate courts decide for themselves the proper sentence under all the circumstances. Even if the verdict form provision somehow could be said to improperly affect the trial judge's sentence decision, it does not affect the independent reconsideration of the aggravating and mitigating circumstances by the appellate courts.

ARGUMENT

I. INTRODUCTION

This case involves the constitutional validity of the capital sentencing procedure which was in effect prior to *Beck v. Alabama*, 447 U.S. 625 (1980), under Alabama's 1975 capital punishment statute. *Code of Alabama* 1975, §§ 13-11-1 through 13-11-9.[6] Petitioner's attack on the sentencing procedure focuses on the jury verdict form

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[6] Because of the *Beck* decision's holding concerning the preclusion clause and for other unrelated reasons, the convictions in most pre-*Beck* death sentence cases have been reversed. See Appendix C. As a result, those cases have been or will be retried and resentenced under different procedures. See p. 43, below.

Petitioner's case is different, because the Alabama Supreme Court affirmed his pre-*Beck* conviction under *Hopper v. Evans*, 456 U.S. 605 (1982), and also affirmed his death sentence. The nine other pre-*Beck* death sentence cases which have not been retried under a different procedure are listed in Appendix A.

provision. That provision specifies that when a jury convicts a defendant of a capital offense its guilt stage verdict form shall contain language formally "fix[ing]" the punishment at death. *Code of Alabama* 1975, § 13-11-2(a).

Petitioner's argument that the sentencing procedure is unconstitutional as a result of the verdict form provision embodies two interrelated and erroneous contentions. First, petitioner contends that the jury is required to reach a sentence determination without being given an opportunity to consider all the aggravating and mitigating circumstances in the case. Secondly, he contends that the trial court judge who has both the opportunity and the duty to consider all the aggravating and mitigating circumstances, is impermissibly influenced by the jury's sentence determination. Both contentions are dependent upon a fundamental misreading of the procedure involved. In addition, his argument misapprehends the effect of the extensive appellate review of the sentencing process and of the sentence itself.

II. THE JURY'S PARTICIPATION IN SENTENCING IS LIMITED TO THE IMPACT ITS ADJUDICATION OF GUILT HAS AS A RESULT OF THE CAPITAL OFFENSES BEING DEFINED TO INCLUDE AGGRAVATION, THE TRIAL COURT MAKES THE SENTENCING DECISION ONLY AFTER CONSIDERING AGGRAVATING AND MITIGATING CIRCUMSTANCES IN A SEPARATE PROCEEDING, AND THE JURY VERDICT FORM PROVISION SERVES A LEGITIMATE FUNCTION

A. The Jury's Role

Under Alabama's 1975 capital punishment statute, the jury does not consider mitigating circumstances because the jury does not have a discretionary role in sentencing:

> The jury, when deliberating on a verdict, is only concerned with the issue of the defendant's guilt or

> innocence. If the verdict is guilty, the jury has no discretion in setting the sentence; the statute provides only for the penalty of death. If the verdict is not guilty, the statute requires that the accused be discharged and, as noted, if the jury cannot agree on a verdict of guilty or not guilty or about fixing the death penalty, the trial court may enter a judgment of mistrial. In either of the above situations the jury has no discretion in determining the defendant's fate. . . .[7]

Ritter v. State, 429 So.2d 928, 936 (Ala. 1983). The jury lacks any discretion in sentencing, because the jury is not the body which determines which convicted murderers die and which do not. *Jacobs v. State*, 361 So.2d 640, 644 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979). Instead, that decision is made by the trial judge, because "[u]nder Alabama's statute the trial court and not the jury is the actual sentencing authority." *Ritter v. State*, *supra*; *accord, e.g., Jacobs v. State*, 361 So.2d 607, 631 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 640 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979).

No convicted capital defendant can be sentenced to death or to life imprisonment without parole except by the trial judge after he has held the separate and independent sentence hearing discussed on pp. 26-30, below. There is no consideration of aggravating and mitigating circumstances until the judge, the actual sentencing authority, conducts a sentence hearing after the jury has returned its guilt stage verdict and been discharged. No sentence exists until the judge decides between death and life imprisonment without parole at the conclusion of that hearing. *E.g., Beck v. State*, 365 So.2d 985, 1005 (Ala. Cr. App.), *aff'd*, 365 So.2d 1006 (Ala. 1978), *rev'd on unrelated grounds*, 447 U.S. 625 (1980).

Even though the jury does not make the sentencing decision under this procedure, it does participate in a lim-

[7] See n.8 on p. 21, below.

ited but important way in the process that ultimately determines sentence. The jury's input into the sentencing process stems from the way in which the statute narrowly defines capital offenses. Prior to *Furman v. Georgia*, 408 U.S. 238 (1972), a death sentence could be imposed on an Alabama defendant convicted of any type of first degree murder or any of twelve non-homicide offenses. *Beck v. State*, 396 So.2d 645, 652 (Ala. 1980). In response to *Furman*, Alabama significantly narrowed the category of capital offenses by removing all non-homicide offenses, all non-intentional killing homicides, and all intentional killing homicides that were not accompanied by the presence of an aggravating circumstance. *See*, § 13-11-2(a); *Beck v. State*, 396 So.2d at 662. This approach is similar to the one taken in the Texas statute which this Court upheld in *Jurek v. Texas*, 428 U.S. 262 (1976). *See, id.*, at 265 n. 1, 268, 270-271; *California v. Ramos*, 103 S.Ct. 3446, 3452 n. 11 (1983).

Each of Alabama's narrowly defined capital offenses contains a homicide component and a definitional aggravating circumstance component. *E.g., Beck v. State*, 396 So.2d at 662; *Hill v. State*, 455 So.2d 930, 932 (Ala. Cr. App. 1984), *aff'd*, 455 So.2d 938 (Ala. 1984), *cert. denied*, 105 S.Ct. 607 (1984). The homicide component for the § 13-11-2(a)(1), (2), (3), (4), (8), and (9) capital offenses is an "intentional killing;" for the § 13-11-2(a)(5), (6), (7), (13), and (14) capital offenses is "murder;" and for the § 13-11-2(a)(10), (11), and (12) capital offenses is "murder in the first degree." *Ex parte Kyzer*, 399 So.2d 330, 335 (Ala. 1981). Because all those homicide components require at a minimum an intentional killing, there can be no conviction for a capital offense without proof beyond a reasonable doubt of the defendant's intent to kill. *E.g., Beck v. Alabama*, 447 U.S. 625, 628 n. 2 (1980); *Ex parte Kyzer, supra*; *Beck v. State, supra*; *Horsley v. State*, 374 So.2d 363, 367 (Ala. Cr. App. 1978), *aff'd*, 374 So.2d 375 (Ala. 1979), *vacated on unrelated grounds*, 448 U.S. 903 (1980).

While proof beyond a reasonable doubt of an intentional killing homicide is necessary to a capital offense conviction, it is not sufficient. Each capital offense also includes as an essential component a definitional aggravating circumstance. *See, e.g.*, § 13-11-2(a); *Beck v. State*, 396 So.2d at 662. For example, in a robbery-intentional killing case such as this one the definitional aggravating circumstance is that the intentional killing homicide the defendant committed occurred during a robbery and involved his killing of the robbery victim. *E.g.*, Section 13-11-2(a)(2); *Ex parte Kyzer*, 399 So.2d at 335-337; *Beck v. State*, 396 So.2d at 662. Because it is a component of the capital offense, the definitional aggravating circumstance must be averred in the indictment and proven beyond a reasonable doubt to a jury before there can be any capital offense conviction. *E.g.*, *Ex parte Kyzer, supra*; *Beck v. State*, 396 So.2d at 663. As a result, no defendant is even eligible for a death sentence until the State has alleged and proven beyond a reasonable doubt to a jury not only the defendant's guilt of an intentional killing homicide but also that an aggravating circumstance exists which makes that homicide different from—and worse than—many others. That was done in this case. (J.A. 2; R. 241-245, 298).

In defining the capital offenses as it did the Alabama Legislature made a policy choice, *Ex parte Kyzer*, 399 So.2d at 336-337, and that choice was to particularize at the threshold of the process those cases in which death was to be an available punishment, *id.*, at 339. As this Court recognized in *Jurek v. Texas*, 428 U.S. 262, 270 (1976), narrowing the category of murders for which the death penalty may be imposed serves the constitutionally mandated goal of individualized sentencing.

Including an aggravating circumstance component in the capital offense definitions serves another purpose in the Alabama system. It allows the jury to have a carefully limited but nonetheless important participation in

the sentencing process, in the broadest sense of that term. The jury's substantive input into sentencing is confined to the impact of its guilt stage adjudication. The jury does not make any finding concerning the existence of mitigating circumstances or concerning the existence of any aggravating circumstance other than the one defined into the offense. The jury does not weigh aggravating and mitigating circumstances, and it does not make a sentencing decision. If it convicts the defendant of the capital offense it is required to return a verdict form containing language which "fix[es] the punishment at death." However, that is a purely ministerial act.[8]

The jury does determine in the first instance, at the guilt stage, whether or not the definitional aggravating circumstance exists. That role is important because unless that aggravating circumstance exists there can be no death sentence regardless of the number of § 13-11-6 aggravating circumstances that are present. *E.g.*, *Ex parte Kyzer*, 399 So.2d at 337. The jury's verdict convicting the defendant of a capital offense necessarily carries with it the jury's finding beyond a reasonable doubt that the definitional aggravating circumstance exists. While the judge is not required to concur in the jury's aggravating circumstance finding, he does consider the fact that the jury in its adjudication of guilt has made that finding about the crucial aggravating circumstance. See pp. 27-28, below. In that way the jury verdict of guilt is "advisory" in a substantive sense. Thus, the jury does have a limited but important role in the sentencing process.[9]

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[8] The provision in § 13-11-2(c) that the trial court may enter a mistrial if the jury fails to agree "on a verdict of guilty or not guilty or on the fixing of the penalty of death" does not indicate to the contrary. That provision simply acts as a safety valve to prevent unjust acquittals if the jury rebels against the required formal language.

[9] *Spaziano v. Florida*, 104 S.Ct. 3154 (1984), establishes that the Constitution does not require any jury participation in the

The way in which the jury's verdict serves an "advisory" function in a procedural sense is discussed below.

B. The Function of the Verdict Form Provision

The language in the guilt stage verdict form "fix[ing] the punishment at death" serves two functions. First, it conveys into the sentencing stage the jury's factfinding, described above, that the essential aggravating circumstance exists. The second function it serves is to express a fundamental policy decision made by the legislature. As the Alabama Supreme Court explained in *Ex parte Kyzer*, 399 So.2d 330, 337, 338 (Ala. 1981), the legislature decided to punish capitally defendants convicted of the aggravated offenses set forth in § 13-11-2(a), unless the trial court after conducting a sentence hearing finds that there are mitigating circumstances which, when weighed against the aggravating circumstances, indicate the sentence should be less than death. That is why under the statute the judge can impose a death sentence based on the aggravation inherent in the capital offense definition, even if none of the additional § 13-11-6 aggravating circumstances exists. *Ex parte Kyzer*, *supra*.

The trial judge as the sentencing authority not only may, but must, impose a death sentence on a defendant guilty of an intentional killing homicide aggravated by one of the circumstances defined into the capital offense, unless there are mitigating circumstances to offset or counter-balance the aggravating circumstance(s). *Ex parte Kyzer*, *supra*.[10] If the jury finds the defendant

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capital sentencing process. However, in Alabama juries have always participated to some extent in the capital sentencing process, *Beck v. State*, 396 So.2d at 659, and in the 1975 statute the legislature prescribed the role described above, *id.*, at 660.

[10] Although the literal language of § 13-11-4(1) seemingly indicates to the contrary, this Court must consider the statute the way the Alabama Supreme Court has construed it. *E.g.*, *Proffit v. Florida*, 428 U.S. 242, 255 (1976) (joint opinion).

guilty of the aggravated intentional killing homicide, *the jury's purely ministerial fixing of the penalty at death conveys that legislative judgment* into the sentence stage. The jury has not made the judgment that the penalty should be death unless sufficient mitigation is shown to the judge at the sentence hearing. The legislature has made it. The jury in delivering the verdict form language to the judge merely acts as the legislature's messenger. In that way, the verdict form language is "advisory" in a procedural sense. It "advises" the sentencing authority of the legislative judgment.

Of course, the validity of the entire scheme is initially dependent on the constitutionality of the legislature's substantive decision that where there is an aggravating circumstance the penalty should be death unless mitigating circumstances indicate to the contrary. In *Proffitt v. Florida*, 428 U.S. 242 (1976), this Court upheld a capital sentencing system which mandated that:

> the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors. . . .

Id., at 260 (concurring opinion of White, J.) (emphasis in original). *Accord*, *e.g.*, *State v. Dixon*, 283 So.2d 1, 19 (1973) (when one or more aggravating circumstances is found, "death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances"); *Cooper v. State*, 336 So.2d 1133, 1136, 1142 (Fla. 1976) (same).[11] Thus, *Proffitt*

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[11] The language of the Florida statute itself indicates that in some cases an aggravating circumstance might not be sufficient to justify a death sentence irrespective of mitigation. *Barclay v. Florida*, 103 S.Ct. 3418, 3426 (1983). However, this Court was required to consider the statute as it had been construed by the Florida Supreme Court, *Proffitt v. Florida*, 428 U.S. at 255, and in

establishes that the substantive legislative judgment reflected in the jury verdict form provision of Alabama's 1975 capital punishment statute is a constitutionally permissible one.

That legislative judgment is certainly not unique. As Appendix B indicates, where there is one or more aggravating circumstances: the statutes of six states require that death be the punishment unless mitigating circumstances exist and outweigh the aggravating circumstance(s); the statutes of five states require that death be the punishment unless mitigating circumstance(s) exist which are not outweighed by the aggravating circumstance(s); and the statutes of four states require that death be the punishment unless sufficient mitigating circumstances exist to preclude it or call for a lesser sentence. None of the statutes of those fifteen states permits an inquiry by the sentencer into the sufficiency of the aggravating circumstance(s), except in relation to the sufficiency or weight of the mitigating circumstance(s). The fifteen statutes contain different procedures, but all of them embody a legislative judgment or presumption which is constitutionally indistinguishable from that which is embodied in the jury verdict form provision at issue in this case.

Any holding that this widespread legislative judgment is constitutionally prohibited not only would be unprecedented, but also illogical. "[A]n aggravating circumstance must genuinely narrow the class of persons eligible

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Dixon that court had construed it to require the sentencer to impose the death penalty absent sufficient mitigating circumstances to offset the aggravating circumstances.

Concurring in *Barclay*, Justice Stevens noted that Florida case law on this point "appears to have evolved over time." 103 S.Ct. at 3430 n.3; *but see, White v. State*, 446 So.2d 1031, 1037 (Fla. 1984). However, at the time of *Proffitt*, Florida case law mandated the death penalty where an aggravating circumstance existed and outweighed any mitigating circumstance(s), and this Court upheld the Florida law.

for the death penalty and must reasonably justify the imposition of a more severe sentencer on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 103 S.Ct. 2733, 2742-2743 (1983) (footnote omitted). The aggravating circumstances defined into Alabama's capital offenses unquestionably do that. *See*, § 13-11-2(a)(1)-(14). In addition, the sentencing authority must be permitted to consider as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978). Alabama's procedure complies. See p. 28, below. Therefore, the substantive legislative judgment conveyed by the verdict form provision amounts to nothing more than a direction that if some aspect(s) of the murder justify the imposition of a death sentence in a particular case compared to others, then the death sentence should be imposed unless some aspect(s) of the defendant's character or record or the circumstances of the offense nonetheless cause the sentencer to conclude that the sentence should not be death. Any holding that such a rule is unconstitutional would turn *Furman* on its head and be a large step backwards toward the pre-*Furman* state of affairs.

Therefore, the jury verdict form provision serves to procedurally convey both the jury's substantive "advice" concerning the existence of the definitional aggravating circumstance and the legislature's constitutionally permissible directive that if that aggravating circumstance exists the sentence should be death unless there are mitigating circumstance(s) which counterbalance it.

C. The Judge's Role

The trial court judge is the sentencing authority. *E.g.*, *Ritter v. State*, 429 So.2d 928, 936 (Ala. 1983); *Jacobs v. State*, 361 So.2d 607, 631 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 640 (Ala. 1978), *cert. denied*, 439 U.S. 1122

(1979). He conducts the sentence hearing, the purpose and importance of which the Alabama courts have described as follows:

> The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done "the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision."

Richardson v. State, 376 So.2d 205, 224 (Ala. Cr. App. 1978), *aff'd*, 376 So.2d 228 (Ala. 1979). Section 13-11-3 provides that any probative evidence the court deems relevant to sentence may be received at the sentence hearing irrespective of the rules of evidence.[12] The Alabama appellate courts have held that: "[t]he defendant must be afforded the opportunity to adduce any testimony which has any probative value that will enable the court to perform its constitutional responsibility for the question of whether a man should live or die is not to be

[12] The only exceptions favor the defendant. The State may not present: any hearsay unless the defendant is accorded a fair opportunity to rebut it, § 13-11-3; any evidence secured in violation of the state or federal constitutions, *id.*; or any evidence of non-statutory aggravating circumstances, *see, e.g., Nelson v. State*, 405 So.2d 392, 400 (Ala. Cr. App. 1980); *Berard v. State*, 402 So.2d 1044, 1050 (Ala. Cr. App. 1980).

treated as a mere formality." *Richardson v. State, supra.* To aid him in his sentence inquiry, the judge may order a pre-sentence report. *E.g., Cook v. State*, 369 So.2d 1251, 1257 (Ala. 1978).

After he has received and considered all the evidence, the threshold question the judge must decide in making his sentencing decision is whether the aggravating circumstance included in the § 13-11-2(a) capital offense definition exists. Unless the judge finds the definitional aggravating circumstance exists, there can be no death sentence regardless of the number of § 13-11-6 aggravating circumstances in the case. As the Alabama Supreme Court has explained:

> the legislature, by requiring the aggravating circumstance to be averred in the indictment, necessarily meant that the trial judge *must find that particular aggravating circumstance* was present in the case [in order to impose a death sentence]. If the trial judge does not find that the aggravating circumstance averred in the indictment is present, there can be no death sentence imposed, although there might be several other statutory [§ 13-11-6] aggravating circumstances present.

Ex parte Kyzer, 399 So.2d 330, 337 (Ala. 1981) (material in brackets added). For example, in the present case, if the trial judge had not found that the capital offense involved robbery, the definitional aggravating circumstance, petitioner could not have been sentenced to death even though the § 13-11-6(1), (2), and (8) aggravating circumstances were present (J.A. 18-19). The judge did find the definitional aggravating circumstance of robbery present, as is indicated by his express finding that the overlapping § 13-11-6(4) aggravating circumstance was present (J.A. 18). *See, Ex parte Kyzer*, 399 So.2d at 334.

In determining whether the definitional aggravating circumstance exists the judge must consider the jury's

"advisory" verdict that it did exist, but the judge is not bound by the jury's finding. In most instances the judge will concur, because the evidence which convinced the jury beyond a reasonable doubt at the guilt stage will cause the judge to reach the same conclusion at the sentence stage. However, "since the trial court at the sentence hearing is allowed substantive and procedural flexibility which is generally prohibited during the jury [i.e., guilt stage] trial," the trial court can reach a sentence finding at odds with the jury's determination of guilt. *Tomlin v. State*, 443 So.2d 47, 52-54 (Ala. Cr. App. 1979), *aff'd*, 443 So.2d 59 (Ala. 1983). If the judge does find, contrary to the jury's guilt determination, that the definitional aggravating circumstance is not present, then there can be no death sentence. *E.g.*, *Ex parte Kyzer*, 399 So.2d at 337.[19]

The aggravating circumstances are confined to the definitional one and any additional ones listed in § 13-11-6: "[t]he statutory aggravating circumstances may not be added to or expanded." *Nelson v. State*, 405 So.2d 392 (Ala. Cr. App. 1980); *accord, e.g.*, *Cook v. State*, 369 So.2d 1251, 1257 (Ala. 1978); *Berard v. State*, 402 So.2d 1044, 1050 (Ala. Cr. App. 1980). The mitigating circumstances are not confined to the statutory ones listed in § 13-11-7. Instead, from the beginning, the Alabama appellate courts have interpreted the statute consistently with *Lockett v. Ohio*, 438 U.S. 586 (1978), to permit consideration of any non-statutory mitigating circumstances. *E.g.*, *Jacobs v. State*, 361 So.2d 640, 652-654 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979); *Cook v. State*, 369 So.2d at 1256; *Baldwin v. State*, 372 So.2d at 32; *see*, *Lockett v. Ohio*, 438 U.S. at 606-607.

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[19] In *Tomlin v. State*, *supra*, a death sentence was nonetheless possible because the defendant was convicted of a capital offense under two sections, § 13-11-2(a)(7) and (10). The judge's sentence stage findings negated only the § 13-11-2(a)(7) definitional aggravating circumstance.

If the definitional aggravating circumstance is present and there is no statutory or non-statutory mitigating circumstance, then the death penalty ministerially "fixed" by the jury at the legislature's direction is "accepted" by the judge. See pp. 22-25, above. However, if there is any mitigating circumstance present—any reason not to impose the death penalty—then the judge weighs the mitigating circumstance(s) against the definitional aggravating circumstance and any additional § 13-11-6 aggravating circumstances present to determine for himself the proper sentence. The weighing process is not one of numerical tallying. *E.g.*, *Cook v. State*, 369 So.2d 1251, 1257 (Ala. 1978). Instead, it involves careful consideration by the judge of the reasons why the death penalty should be imposed in a given case (the aggravating circumstances) against the reasons why it should not be imposed (the mitigating circumstances). No specific weights are assigned to aggravating and mitigating circumstances. *Cf.*, *Proffitt v. Florida*, 428 U.S. at 257-258. In a particular case a single mitigating circumstance may "outweigh" a number of aggravating circumstances, or the converse could be true. *Cook v. State*, *supra*.

Section 13-11-4 does indicate that in arriving at his sentencing decision, the judge is to consider or weigh the fixing of the punishment at death by the jury. However, the statute does not direct the judge to weigh the jury's action as though the jury was advising him about whether the aggravating circumstances outweigh the mitigating circumstances. The jury does not even consider the existence of any mitigating circumstances or of any aggravating circumstance other than the definitional one. The judge knows that. The statute does not direct the judge to consider the jury's action as any indication of what the jury thinks the sentence should be. Under the statute, the jury plainly has no choice about what punishment to fix in its verdict form. The judge knows that.

The limited weight and consideration which the statute actually prescribes for the jury's verdict, and which the

judge in fact accords it, has two aspects. First, the jury's fixing of the punishment at death reflects its considered finding that the important definitional aggravating circumstance is present, see pp. 20-21, above, and the judge considers it as advice concerning that issue. Secondly, the jury's ministerial action in fixing the penalty at death reflects the legislative judgment that if that definitional aggravating circumstance exists, the penalty should be death unless the judge finds mitigating circumstances sufficient to call for a lesser penalty. See pp. 22-25, above. The statute, in effect, directs the judge to "weigh" that legislative judgment when determining what the proper sentence should be. Because of the seriousness of the narrowly defined capital offenses, the legislature has fixed the initial penalty at death, but has required the judge to consider any reason the death penalty should not be imposed in the particular case. If any such reason exists, the sentencing decision is made by the judge.

If the judge decides that the reasons not to impose the death sentence in the case (mitigating circumstances) are sufficient to counter-balance the reason(s) to impose the death sentence (aggravating circumstance(s)), he sentences the defendant to life without parole and necessarily rejects the penalty "fixed" by the legislature in the jury verdict form. If he determines that the reasons to impose the death penalty outweigh the reasons not to, he sentences the defendant to death and necessarily "accepts" the penalty "fixed" in the verdict form. *Ex parte Baldwin*, 456 So.2d 129, 139 (Ala. 1984). (J.A. 56) As the Alabama Supreme Court has interpreted the statute:

> the court, which is the sentencing authority, considers the circumstances of the particular offense and the character and propensities of the offender, i.e., the aggravating and mitigating circumstances, in a separate and independent sentencing hearing, and then imposes the sentence.

Id. That is what the Constitution requires, and that is what the judge does.

III. APPELLATE REVIEW OF DEATH SENTENCE CASES IS ENHANCED AND INCLUDES INDEPENDENT REVIEW OF THE APPROPRIATENESS OF THE DEATH SENTENCE IN EACH INDIVIDUAL CASE

Under Alabama's 1975 statute, both the conviction and the sentence in every capital case is subject to automatic appellate review, §§ 13-11-5 and 12-22-150, even if the defendant does not desire it, *see, e.g., Evans v. State*, 361 So.2d 666, 667 (Ala. 1978). That review is by two tiers of appellate courts. If the Court of Criminal Appeals affirms both the conviction and death sentence, and only if it does, certiorari review by the Alabama Supreme Court is automatic. A.R.A.P. 39(c). This rule, special to capital cases, ensures that no capital case will be affirmed until fourteen judges on two appellate courts have reviewed it.

Appellate review is also enhanced by two other special rules applicable only to capital cases. One requires the Court of Criminal Appeals to search the record in a capital case for errors in either the guilt or sentence stage that have not been raised on appeal, A.R.A.P. 45B, *modifying* § 12-22-240, and permits the Alabama Supreme Court to do so. Both courts have searched the record in capital cases and found errors in sentence proceedings not raised on appeal. *Cook v. State*, 369 So.2d 1251, 1252, 1255-1257 (Ala. 1978); *Ashlock v. State*, 367 So.2d 560, 561 (Ala. Cr. App. 1978), *cert. denied*, 367 So.2d 562 (Ala. 1979).

The other special rule provides that the Court of Criminal Appeals is required, A.R.A.P. 45A, and the Alabama Supreme Court is permitted, A.R.A.P. 39(k), to reverse a death sentence case for any plain error affecting the conviction or sentence, notwithstanding the defendant's failure to raise or preserve the issue in the trial court. Capital convictions, *e.g., Jacobs (John L.) v. State*, 371 So.2d 448, 449-450 (Ala. 1979), and sentences, *e.g., Cook*

v. State, 369 So.2d at 1257, have been reversed under the plain error rule.

Review is also enhanced by the attitude of the Alabama appellate courts concerning death sentence cases. In reviewing a case against the defendant's wishes, the Alabama Supreme Court recognized a "dominant and overriding interest in ensuring that the death penalty is imposed only for utmost of compelling legal reasons." *Evans v. State*, 361 So.2d at 667. In reversing a death sentence for errors which were not raised at trial or on appeal and probably made no difference anyway, *Cook v. State*, 369 So.2d at 1252, 1255, 1257, the court said that, "where the State proposes to take a life as punishment for crime, it is our duty to insure that the proper result is reached," *id.*, at 1257. The court has also recognized the non-availability of corrective mechanisms once a capital sentence has been carried out, *id.*, at 1255, and said that, "[t]o pass on the death sentence is the gravest and most delicate duty that this court is called upon to perform," *Ritter v. State*, 429 So.2d at 937.

How seriously the Alabama appellate courts have taken that duty is shown by the results of their review in pre-*Beck* cases like this one. Appendix C to this brief lists the death sentence cases in which at least one opinion was issued before the decision in *Beck v. Alabama*, *supra*. There were thirty-four. In six (18%) the convictions were reversed. In fifteen (44%) the death sentences were reversed and new proceedings ordered because of errors at the sentence hearing, or in the trial court's sentence findings, or in the sentence itself. Only in thirteen cases (38%), including this one, were both the conviction and sentence affirmed on the first review.

In addition to thoroughly reviewing capital cases "to insure that no error has tainted the trial or the sentencing process," *Cook v. State*, 369 So.2d at 1255, the Alabama appellate courts also review the death sentence to determine for themselves whether it is appropriate under

all the circumstances. *See, e.g., Bracewell v. State*, 401 So.2d 123, 124 (Ala. 1979) (directing the Court of Criminal Appeals to review the propriety of the death sentence). This review has two components.

First, the Alabama appellate courts perform comparative proportionality review in which the death sentence in each case is compared to the results in similar cases as a safeguard against arbitrariness. This type of review under Alabama's 1975 statute is remarkably similar to that under Florida's statute. Neither statute expresely provides for it, but both states' appellate courts have read it into their statutes. *Compare State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973) *with Jacobs v. State*, 361 So.2d 640, 644 (Ala. 1978), and *Beck v. State*, 365 So.2d 985, 1005 (Ala. Cr. App. 1978).[14] In *Pulley v. Harris*, 104 S.Ct. 871 (1984), this Court noted that comparative proportionality review has been part of Florida's theory of appellate review since the beginning, having been endorsed in the very first case decided under Florida's statute, although the Florida Supreme Court "has undeniably become more enthusiastic, or at least more explicit, about proportionality review in recent years," *id.*, at 877-878 n.8. The same is true in Alabama. It was endorsed in the very first case, *Jacobs v. State*, *supra*, although the Alabama appellate courts have undeniably become more enthusiastic, or at least more explicit, about it in recent years. *Compare Baldwin v. State*, 372 So.2d 26, 32 (Ala.

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[14] Alabama's 1981 capital punishment statute does specifically provide for in-depth appellate review of every death sentence, including comparative proportionality review. *Code of Alabama* 1975, § 13A-5-53(b). Although that statute applies only to cases in which the crime occurred on or after July 1, 1981, § 13A-5-57, the Alabama appellate courts have "borrowed" its provisions for review of cases tried under the 1975 statute. *Hill v. State*, 455 So.2d 930, 936 (Ala. Cr. App.), *aff'd*, 455 So.2d 938 (Ala.), *cert. denied*, 105 S.Ct. 607 (1984); *Baldwin v. State*, 456 So.2d at 128 (J.A. 37-38); *Horsley v. State*, No. 1 Div. 931 (Ala. Cr. App. Nov. 29, 1983), Ms. op. at 3.

Cr. App. 1978), *with Baldwin v. State*, 456 So.2d 117, 128 (Ala. Cr. App. 1983) (J.A. 37-38). In *Pulley* this Court also noted that the Florida Supreme Court has not expressly reviewed the comparative proportionality of every death sentence, but went on to hold that the fact it was not done explicitly in a case does not mean that it was not done at all. 104 S.Ct. at 877-878 n.8. The same is true in Alabama.[15]

Georgia's system of appellate review of death sentences has received much praise from this Court. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (joint opinion); *id.*, at 222-224 (concurring opinion of White, J.); *Pulley v. Harris*, 104 S.Ct. at 882, 884 (concurring opinion of Stevens, J.). Alabama's system is even more extensive. In addition to encompassing all three of the Georgia appellate determinations, *see, Gregg v. Georgia*, 428 U.S. at 212, Alabama's review adds another inquiry—whether the appellate court, in its own independent judgment thinks that the aggravating circumstances outweigh the mitigating circumstances.[16]

The importance of this added step is shown in *Lewis v. State*, 380 So.2d 970 (Ala. Cr. App. 1979), in which

[15] The Florida Supreme Court has had more opportunity to engage in comparative proportionality review than the Alabama courts have. Because of its larger population, older statute, and more broadly defined capital offenses, Florida had 140 murderers on death row compared to Alabama's 38, just before *Beck v. Alabama*, *supra*. "Death Row, U.S.A.," NAACP Legal Defense Fund Report (April 20, 1980).

[16] This aspect of appellate review is often explicitly reflected in the opinions. *E.g., Beck v. State*, 365 So.2d at 985; *Crawford v. State*, 377 So.2d 145, 159 (Ala. Cr. App.), *aff'd*, 377 So.2d 159 (Ala. 1979), *vacated on unrelated grounds*, 448 U.S. 904 (1980); *Evans v. State*, 361 So.2d at 662; *Bryars v. State*, 456 So.2d 1122, 1133 (Ala. Cr. App. 1983), *rev'd on unrelated grounds*, 456 So.2d 1136 (Ala. 1984); *see also, Neal v. State*, 372 So.2d 1331, 1347 (Ala. Cr. App. 1979) (concurring opinion of Bowen, J.). It was in this case. (J.A. 37-38, 58)

a death sentence was imposed in a robbery-intentional killing case. As the cases summarized in Appendix A indicate, death sentences are certainly not unusual in robbery-intentional killing cases. Therefore, comparative proportionality review did not suggest a reduction of sentence in *Lewis*. However, when the Court of Criminal Appeals independently weighed the aggravating and mitigating circumstances itself, it concluded that the mental state mitigating circumstances in that particular case outweighed the aggravating circumstances and that the sentence should not be death. Accordingly, it reversed the sentence and ordered the trial court to conduct new proceedings in conformity with the appellate court's decision that "the death sentence should be reduced to a sentence of life imprisonmont without parole." *Id.*, at 971, 972, 976-977. Pursuant to the appellate court's directions and mandate, the trial court reduced the sentence.[17]

To ensure that they are able to independently weigh the aggravating and mitigating circumstances themselves, the Alabama appellate courts have strictly enforced the requirement that trial judges enter complete written findings concerning aggravating and mitigating circumstances whenever a death sentence is imposed. *E.g., Mack v. State*, 375 So.2d 476, 500-501 (Ala. Cr. App. 1978); *aff'd*, 375 So.2d 504 (Ala. 1979), *vacated on unrelated grounds*, 448 U.S. 903 (1980).

[17] When it deems a death sentence excessive, an Alabama appellate court does not reduce the sentence itself, but instead remands the case to the trial court for that purpose. The same is true in Georgia. *Gregg v. Georgia*, 428 U.S. at 168 ("the court may affirm the death sentence or remand the case for resentencing"). Constitutionally, it is immaterial whether the appellate court reduces the sentence itself or directs the trial court to do so.

In *Lewis*, although the trial court conducted a new sentence proceeding on remand, it based the sentence of life without parole which it imposed thereafter not on any new evidence but instead on "the directions" and "the mandate" of the appellate court. 380 So.2d at 979-980 (after remand).

In summary, Alabama's pre-*Beck* capital sentencing system incorporates a thorough and effective system of enhanced appellate review which ensures that no error taints the trial or sentencing process. It also ensures non-arbitrary individualized sentencing through both comparative proportionality review and independent weighing of the aggravating and mitigating circumstances in each case by the appellate courts. No death sentence leaves the Alabama appellate system unless and until the Court of Criminal Appeals and the Alabama Supreme Court have each determined that the death sentence is appropriate under the facts of that particular case.[18]

IV. THE SENTENCE WAS CONSTITUTIONALLY IMPOSED IN THIS AND THE REMAINING PRE-*BECK* DEATH SENTENCE CASES

A. The Statute is Not a Mandatory Death Penalty System

A capital statute which requires the sentencing authority to impose the death sentence on every defendant convicted of a specified offense without allowing it to con-

[18] Because capital offenses were narrowly limited to aggravated homicide crimes, and because the cases meriting a sentence less than death received it at the trial level, Alabama's appellate courts had little opportunity to order any sentences reduced in the four years the statute operated prior to *Beck v. Alabama, supra*. They did do so in the *Lewis* case.

In its first decade of reviewing post-*Furman* cases the Georgia Supreme Court vacated and remanded seven death sentences for reduction. *See, Pulley v. Harris*, 104 S.Ct. 871, 890-891 (1983) (dissenting opinion of Marshall, J.). However, only two of those were homicide cases, and in one the defendant had received a life sentence for the same offense in an earlier trial. *Id.*; *see, Bullington v. Missouri*, 451 U.S. 430 (1981). Therefore, the Alabama appellate courts reduced as many comparable homicide death sentences (one) in four years as the Georgia Supreme Court did in ten years. That is true even though Georgia has had many more death sentences imposed than Alabama. *See*, "Death Row U.S.A.," *supra*, (two months before *Beck*, Alabama had 38 on death row, Georgia had 98).

sider mitigating circumstances is unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). However, this statute is not a mandatory one. The trial judge, who is the actual sentencing authority, considers mitigating circumstances and is not required to impose the death sentence. Approximately one-third of the convictions under this statute did not result in a death sentence.[19]

If the statute were mandatory, the judge would not have held a hearing in this case the express purpose of which was "to aid in the determination of whether or not the Court will sentence the defendant to death or to life imprisonment without parole." (J.A. 5) During that hearing he would not have repeatedly expressed his desire to be told of all mitigating circumstances. (J.A. 10, 12-13, 14) Nor would the appellate courts have independently decided whether death was the proper sentence in this particular case. (J.A. 37-38, 58)

B. The Verdict Form Provision Does Not Distort the Jury's Role or Have Any Adverse Effect on the Guilt Phase

Petitioner argues that requiring the jury to make a sentencing decision without providing it with sufficient information leads to irrational and uncertain sentencing

[19] According to a stipulation filed in the *Evans* case, by the same attorneys who represent the parties in this case, as of May 14, 1979, sixty-five defendants had been convicted of capital offenses and sentenced under the statute. Twenty-two of those defendants received life without parole sentences from the trial court. Thirteen of those twenty-two were cases in which the defendant pleaded guilty, and nine were not. Record in *Hopper v. Evans*, 456 U.S. 605 (1982), at 67-68.

Guilty plea convictions should be included in considering the sentencing results under the statute, because prosecutors are more likely to agree to a guilty plea and life without parole sentence in those cases less deserving of a death sentence. *Cf., Gregg v. Georgia*, 428 U.S. at 225 (White, J., concurring). Therefore, excluding guilty plea convictions skews the analysis. See also, n.22 on pp. 40-41, below.

results. The obvious fallacy of his argument is that the jury is not the sentencing authority and does not make any decision about what the sentence should be. The jury's action in regard to the verdict form language is purely ministerial and without choice, as the jury is plainly told (R. 242-243, 246-247). The jury is not given any guidelines to the exercise of its sentencing power, because it does not have any sentencing power. The discretionary sentencing power is vested in the trial judge, who is given guidelines for the proper exercise of it. See pp. 25-30, above.

Because the jury is not told that the judge will later conduct a sentence hearing to decide on the actual punishment, it may appear to the jury that if it convicts the defendant of the capital offense he will be sentenced to death. However, that could only have benefited petitioner. The plurality of opinions in *Woodson* and *Roberts* are replete with, and to some extent dependent on, historical evidence that juries are more reluctant to convict in cases where they believe a death sentence will be the automatic result. Surely, petitioner is not entitled to have his sentence set aside because the procedures under which he was tried created an unnecessary risk that he would be *acquitted*.

The plurality opinions in *Woodson* and *Roberts* did suggest that under some systems, facing the jury with a mandatory sentencing provision might produce so many unjust acquittals that it would infect the overall sentencing pattern with arbitrariness and capriciousness like that of the pre-*Furman* days. Such a result was predicted or assumed for the systems struck down in *Roberts*, 428 U.S. at 334-335, and *Woodson*, 428 U.S. at 303. The same prediction or assumption cannot be made here. Indeed, there is no need to predict or assume anything here. This system is closed; the results are in. During the four years Alabama's pre-*Beck* system operated, there was a 4% acquittal rate in capital cases. *Beck v. Alabama*, 447 U.S. at 641. Because it is absolutely undisputed that the verdict form provision did not infect the sentencing pattern with unjust acquittals, petitioner's contention that it might have been expected to do so, should be rejected.[20]

C. The Verdict Form Provision Does Not Inject Irrelevant or Impermissible Factors into the Judge's Sentencing Decision

Petitioner's argument that the verdict form provision injects an impermissible or arbitrary consideration into the judge's sentencing decision, and the federal appeals court holding to that effect in *Ritter v. Smith*, *supra*, are both dependent on a fundamentally erroneous assumption. They both assume that the statute requires the judge to consider or weigh the jury's verdict as though the jury had actually made a decision or recommendation about punishment. As is discussed in detail on pp. 22-30, above, that is not how the Alabama Supreme Court has construed the statute, and that is not how the process works. Instead, the jury's verdict, including the purely formal language "fix[ing]" the punishment, is given a much more limited but legitimate weight and consideration by the judge.

Petitioner's insistence that the sentencing judge treats the verdict language as though it embodied a real decision by the jury on the sentence issue reflects an apparent belief that the sentencing judge is unaware of the jury's lack of choice about the matter. Petitioner does

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[20] If petitioner's argument that the verdict form provision "blurred" and "distorted" the guilt phase contains a contention that the provision may have caused unjust convictions, that contention should also be rejected. There is not only no evidence to support the contention, but all the evidence about jury behavior in response to mandatory sentencing requirements, which was surveyed in *Woodson* and *Roberts*, is directly to the contrary. Moreover, as the Eleventh Circuit Court of Appeals has held, *Ritter v. Smith*, 726 F.2d 1505, 1514 n.21 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 218 (1984), this Court's decision in *Hopper v. Evans*, 456 U.S. 605 (1982), necessarily establishes that the verdict form provision did not taint pre-*Beck* convictions.

not explain how a judge who instructs the jury at the guilt stage that it has no choice (R. 242-243, 246-247) can himself be ignorant of that fact at the sentence stage.

Nor did the public announcement of the jury's verdict language pressure any judge into sentencing a defendant to death despite mitigating factors that call for a lesser sentence. To argue that any judge was so influenced because of public pressure demeans the judicial office and is inconsistent with one of the most fundamental assumptions of our system of justice—judges will do their duty without regard to public clamor or comment. It is true that one Alabama Supreme Court justice has expressed fears about the public pressure that might be exerted on the sentencing judge in this regard. *See, Beck v. Alabama*, 447 U.S. at 625 n. 22. However, his comments were answered by a majority of that court which pointed out that judges had continued to impose life without parole sentences under the statute, and also that no death sentence would be upheld unless both the Court of Criminal Appeals and the Alabama Supreme Court found it to be proper. *Jacobs v. State*, 361 So.2d at 654.[21]

The fact that a substantial number of those convicted under the statute were sentenced to death, see n. 19 on p. 37, above,[22] does not demonstrate that the verdict form

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[21] It should also be pointed out that the justice cited only one case which he thought involved a public "outcry of unjustified criticism" over a judge's decision to sentence a defendant to death. *Id.*, at 650-651 & n.3. That the public criticism of the sentencing decision in that case probably was not unjustified is evident in the Court of Criminal Appeals' subsequent opinion in that case. *Nolen v. State*, 376 So.2d 1145, 1148 (Ala. Cr. App. 1979); *id.*, at 1148 (concurring opinion of DeCarlo, J.).

[22] The statistics contained in footnote 22 of the *Beck* opinion do not encompass guilty plea convictions, which also require a jury verdict of guilt "fix[ing] the punishment at death" under Alabama law. *See, Prothro v. State*, 370 So.2d 740 (Ala. Cr. App. 1979).

provision produced unjust death sentences. No defendant could be convicted of a capital offense without proof beyond a reasonable doubt that he committed an intentional killing homicide accompanied by an aggravating circumstance of the most serious sort. See pp. 19-20, above. In view of that, it would have been extraordinary if any other sentencing pattern had emerged.

The death sentence in this case and the ones described in Appendix A are the only remaining ones imposed under this procedure. Nothing indicates that these ten death sentences are in any way unjust.

D. The Appellate Review System Ensured that Any Arguably Improper Effect of the Verdict Form Provision Did Not Affect the Final Sentence

This Court's decisions establish that appellate review of death sentences is an important safeguard which must be considered in determining the constitutionality of a statute or any part of it which is under attack. *E.g., Pulley v. Harris*, 104 S.Ct. 871, 877, 880 (1984); *Zant v. Stephens*, 103 S.Ct. 2733, 2749-2750 (1983); *Barclay v. Florida*, 103 S.Ct. 3418, 3428 (1983). Alabama's enhanced and effective system of appellate review is discussed on pp. 31-36, above. Under that system, petitioner's sentence was reconsidered and held to be proper by two appellate courts, both of which independently weighed the aggravating and mitigating circumstances without regard to the jury's formal verdict language. (J.A. 37-38, 58) Both courts decided for themselves that death was the appropriate sentence because in each court's judgment the aggravating circumstances "greatly outweighed" the mitigating circumstance(s). (J.A. 38, 58)

They should be included for the reasons dircussed in n.19 on p. 37, above.

In addition, neither the statistics contained in n.22 of the *Beck* opinion nor those in n.19 of this brief reflect the reduction in death sentences that occurred in a number of the cases because of appellate review and new proceedings on remand.

In *Wainwright v. Goode*, 104 S.Ct. 378, 383 (1983), this Court held that even if an allegedly improper factor had infected the sentencing process at the trial level, the sentence was nonetheless valid, because:

> Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently, there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.

Id., at 383. *See also, Strickland v. Washington*, 104 S.Ct. 2052, 2069 (1984) (inquiry into whether an error was prejudicial as to sentence must include role of appellate court when it reweighs the evidence). The same is true here. Even if it be assumed that the verdict form provision affected the trial judge's sentencing decision, there cussed on pp. 31-36, above. Under that system, petitionis no basis for concluding that it was considered during the independent reweighing of aggravating and mitigating circumstances by both of Alabama's appellate courts.

The dictum in *Zant* that harmless error analysis is unavailable where the state treats as [illegible]ating circumstance factors that are "cons[illegible]mpermissible or totally irrelevant to the sentencing process" 103 S.Ct. at 2747, does not apply here. The jury verdict form provision does not do that, see pp. 22-25, above, and the aggravating circumstances considered by the trial judge (J.A. 18) and by the appellate courts (J.A. 28-38, 57-58) are not constitutionally impermissible or irrelevant.

E. The Decisions in *Beck v. Alabama*, 447 U.S. 625 (1980), and *Beck v. State*, 396 So.2d 645 (1980), Do Not Establish that the Sentencing Procedure is Unconstitutional

This Court did not grant certiorari in *Beck v. Alabama*, 447 U.S. 625 (1980), to decide whether the existence of

the verdict form provision invalidated a capital sentence, *id.*, at 627, nor did it purport to do so. *Beck's* holding and its sweeping language concerning the net effect of the preclusion clause and verdict form provision "in every case," *id.*, at 638-643, were expressly limited in *Hopper v. Evans*, 456 U.S. 605 (1982), to only those cases in which there was an evidentiary basis for a lesser offense verdict, *id.*, at 610-612. *Accord, Ritter v. Smith*, 726 F.2d at 1514 n. 22; *see also, Zenith Radio Corp. v. United States*, 437 U.S. 443, 459-462 (1978). This is not such a case. (J.A. 22-24, 43-48) Therefore, neither the holding nor the rationale of *Beck*, as limited in *Evans*, applies here.

Faced with the invalidation of the preclusion clause, the Alabama Supreme Court restructured the sentencing procedure for future trials or retrials under the statute. *Beck v. State*, 396 So.2d 645 (1980). The verdict form provision was deleted, but not because the court thought it had operated unconstitutionally in the past. Instead, it was deleted because the court feared that without the preclusion clause the verdict form provision might cause future juries to use lesser included offenses to unjustly acquit capital defendants. *Ex parte Baldwin*, 456 So.2d at 139-140 (J.A. 56-57). Applying the new procedure only to cases to be tried or retried in the future—cases in which a lesser included offense verdict might be available—was a rational approach. *See, Dobbert v. Florida*, 432 U.S. 282, 301 (1977). The court did not think that the verdict form provision operated unconstitutionally in pre-*Beck* cases and in fact has repeatedly held to the contrary. *E.g., Ex parte Baldwin*, 456 So.2d at 137-140 (J.A. 52-57).[23]

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[23] Nor did the legislature think so when it later enacted a new capital punishment statute. *See*, § 13A-5-57 (1982) (pre-existing law left in effect).

F. What the Issue Is and Is Not

The issue in this case is not whether the legislature could have chosen some other procedure to serve the legitimate functions of the verdict form provision. This Court has upheld the Texas, Florida, Georgia, and California systems; each one uses procedures which vary from the others; therefore, each system could have employed different procedures to serve legitimate functions. Each distinct system must be examined on an individual basis. *E.g., Gregg v. Georgia*, 428 U.S. at 195.

The issue in this case is not the uniqueness of the verdict form provision. Saying, "[w]e take statutes as we find them," *Pulley v. Harris*, 104 S.Ct. at 876, this Court has often upheld capital sentencing provisions that are unusual or rare. *Id.*, at 876, 890; *Spaziano v. Florida*, 104 S.Ct. at 3164-3165; *California v. Ramos*, 103 S.Ct. at 3459-3460 & n.30. Nor is the issue whether this Court prefers the verdict form provision or thinks it wise as a policy matter. *See, Gregg v. Georgia*, 428 U.S. at 174-175 & n.20.

The issue is not whether the pre-*Beck* sentencing procedures, including the verdict form provision, are perfect. Perfection is not required, because "[t]here is no perfect procedure for deciding in which cases governmental authority should be used to impose death." *Lockett v. Ohio*, 438 U.S. at 605; *accord, e.g., Pulley v. Harris*, 104 S.Ct. at 881; *Gregg v. Georgia*, 428 U.S. at 226 (concurring opinion of White, J.)

Instead, the issue is whether petitioner was constitutionally sentenced to death. Petitioner was sentenced under procedures which suitably directed and limited the sentencing judge's discretion and at the same time permitted an individualized determination on the basis of the character and record of the individual and the circumstances of the crime. The procedures included an enhanced and effective system of appellate review which

resulted in a redetermination of the propriety of the sentence. Moreover, given the particularly outrageous nature of petitioner's crime, see pp. 3-8, above, and the virtual absence of mitigating circumstances, see pp. 9-12, above, any constitutionally permissible capital sentencing system would have produced the same result.

CONCLUSION

The decision of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

THE OTHER PRE-BECK DEATH SENTENCE CASES

Charles Bracewell v. State

On August 15, 1977, Bracewell and a female co-defendant robbed and murdered Rex Carnley, who owned and operated a country store. *Bracewell v. State*, 407 So.2d 827, 829-837 (Ala.Cr.App. 1979). According to his own statement, after the female co-defendant initially shot Carnley, Bracewell took the gun from her and shot the wounded and helpless man in the back of the head and several times in the face. *Id.* Bracewell was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(2) capital offense of robbery-intentional killing. After conducting a sentence proceeding, in which it was proven that Bracewell had been previously convicted of the felony offenses of kidnapping and robbery, the trial court sentenced him to death. *Id.*

The Alabama Court of Criminal Appeals affirmed Bracewell's conviction and sentence. *Bracewell v. State*, *supra*. The Alabama Supreme Court ordered the case remanded to the trial court for further proceedings, including additional sentence proceedings because of the misapplication of an aggravating circumstance. *Ex parte Bracewell*, 407 So.2d 845 (Ala. 1979). Following additional sentence proceedings, in which the misapplication of the aggravating circumstance was corrected, the trial court found that the aggravating circumstances still outweighed the mitigating circumstances, which were none, and resentenced Bracewell to death. The Court of Criminal Appeals affirmed. *Bracewell v. State*, 407 So.2d 848 (Ala.Cr.App. 1980).

In the meantime, this Court had entered its decision in *Beck v. Alabama*, 447 U.S. 625 (1980), and the Alabama Supreme Court had entered its decision in *Beck v. State*,

396 So.2d 645 (Ala. 1980). Thereafter, the Alabama Supreme Court entered a decision remanding the case to the Alabama Court of Criminal Appeals for reconsideration in light of the *Beck* decision. *Ex parte Bracewell*, 407 So.2d 853 (Ala. 1981). The Alabama Court of Criminal Appeals reversed based upon the *Beck* decision, *Bracewell v. State*, 407 So.2d 854 (Ala.Cr.App. 1981), and the Alabama Supreme Court denied the State's petition for a writ of certiorari. *Ex parte State*, 407 So.2d 854 (Ala. 1981).

Thereafter, the State petitioned this Court for a writ of certiorari, and it granted the State's petition and remanded the case to the Alabama Court of Criminal Appeals for further consideration in light of *Hopper v. Evans*, 456 U.S. 605 (1982). *Alabama v. Bracewell*, 102 S.Ct. 2920 (1982). On remand, the Alabama Court of Criminal Appeals reversed the conviction in the case once more, on authority of *Beck v. Alabama*, 447 U.S. 625 (1980), notwithstanding *Hopper v. Evans*, 456 U.S. 605 (1982). However, on December 18, 1984, the Alabama Supreme Court granted the State's petition for a writ of certiorari in order to review the Court of Criminal Appeals decision. *Ex parte Bracewell*, No. 84-120. The case was submitted to the Alabama Supreme Court on January 10, 1985, and no decision has been announced.

[This case is contained in this appendix notwithstanding the Alabama Court of Criminal Appeals' reversal of the conviction, because of the Alabama Supreme Court's action in granting certiorari. If the Alabama Supreme Court reverses the Court of Criminal Appeals' reversal of the conviction, that action will reinstate Bracewell's pre-*Beck* death sentence.]

John Ronald Daniels v. State

Daniels is the hit man or contract killer who was hired by Phillip Wayne Tomlin to commit a murder. The facts

of the crime are described in the discussion of Tomlin's case, on p. 9a, below. Pursuant to his contract with Daniels, Tomlin committed a double murder on January 2, 1977. He was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(10) capital offense of murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts. After conducting a sentence hearing, the trial court sentenced Daniels to death.

Citing *Beck v. Alabama*, 447 U.S. 625 (1980), the Court of Criminal Appeals reversed Daniels' conviction, *Daniels v. State*, 406 So.2d 1023 (Ala.Cr.App. 1981), and the Alabama Supreme Court denied the State's petition for a writ of certiorari, *Ex parte State*, 406 So.2d 1024 (Ala. 1981). However, this Court vacated the Court of Criminal Appeals' judgment and remanded the case to it for further consideration in light of *Hopper v. Evans*, 456 U.S. 605 (1982). *Alabama v. Bracewell*, 102 S.Ct. 2920 (1982).

Following that remand, the case has been submitted to the Alabama Court of Criminal Appeals for decision. The Alabama Court of Criminal Appeals has entered an order holding the case in abeyance pending the decision of this Court in the *Baldwin* case.

Timothy Charles Davis v. State

On July 20, 1978, Davis robbed, sodomized, and brutally murdered an elderly female store owner, by stabbing her in the back seventeen times with a "common steak knife." *Timothy Charles Davis v. State*, No. 5 Div. 538 (Ala.Cr.App. Oct. 9, 1984). He was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(2) capital offense of robbery-intentional killing. After conducting a sentence hearing, the trial court sentenced Davis to death. *Id.*

The Alabama Court of Criminal Appeals has affirmed Davis' conviction, *id.*, and the issue concerning the validity of his death sentence is pending before that court on applications for rehearing filed by both sides. However, the Court of Criminal Appeals has entered an order holding any decision on the rehearing applications and the sentence issue addressed therein in abeyance pending the decision of this Court in the *Baldwin* case.

Walter Hill v. State

On January 7, 1977, Hill "heartlessly and methodically executed three defenseless persons," one of whom was retarded. *Hill v. State*, 455 So.2d 930, 937-938 (Ala.Cr. App. 1984). Hill was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(10) capital offense of murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts. After conducting a sentence hearing in which it was established that Hill had previously been convicted of two unrelated murders, of kidnapping, and of violation of the Dyer Act, the trial court sentenced him to death.

Hill's original conviction was reversed under the *Witherspoon v. Illinois*, 391 U.S. 510 (1968), decision. *Hill v. State*, 371 So.2d 60 (Ala.Cr.App. 1978). Thereafter, he was retried, reconvicted, and resentenced to death. Citing *Beck v. Alabama*, 447 U.S. 625 (1980), the Court of Criminal Appeals reversed Hill's reconviction, *Hill v. State*, 407 So.2d 567 (Ala.Cr.App. 1981), and the Alabama Supreme Court denied the State's petition for a writ of certiorari, *Ex parte State*, 407 So.2d 567 (Ala. 1981). However, this Court vacated the Court of Criminal Appeals' decision and remanded the case to that court for further consideration in light of *Hopper v. Evans*, 456 U.S. 605 (1982). *Alabama v. Hill*, 102 S.Ct. 2920 (1982).

On remand, the Alabama Court of Criminal Appeals reconsidered its prior decision in light of *Hopper v. Evans*, *supra*, and affirmed Hill's conviction and death sentence. 455 So.2d 930 (Ala. Cr. App. 1984). The Alabama Supreme Court affirmed that decision. *Ex parte Hill*, 455 So.2d 938 (Ala. 1984), and this Court denied Hill's petition for a writ of certiorari. *Hill v. Alabama*, 105 S.Ct. 607 (Ala. 1984). Hill has not yet filed a collateral attack on his conviction or sentence.

Edward Horsley v. State

Horsley is Baldwin's co-defendant, and his participation in the crime is adequately described on pp. 3-6 of this brief. Like Baldwin, Horsley was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(2) capital offense of robbery-intentional killing. After conducting a sentence hearing, at which Horsley's prior unrelated robbery conviction was established, the trial court sentenced him to death. *Horsley v. State*, 374 So.2d 363, 364-365, 373-375 (Ala. Cr. App. 1978).

Horsley's conviction and death sentence were affirmed by the Court of Criminal Appeals, *id.*, and that decision was affirmed by the Alabama Supreme Court, *Horsley v. State*, 374 So.2d 375 (Ala. 1979). This Court granted Horsley's petition for a writ of certiorari, vacated the judgment of the Alabama Supreme Court, and remanded the case to that court for further consideration in light of *Beck v. Alabama*, 447 U.S. 625 (1980). *Horsley v. Alabama*, 448 U.S. 903 (1980). On remand, the Alabama Supreme Court remanded the case to the Court of Criminal Appeals for further consideration in light of the *Beck* decision. *Horsley v. State*, 409 So.2d 1346 (Ala. 1981).

When the case reached the Alabama Court of Criminal Appeals on remand, it reversed the conviction on *Beck* grounds, 409 So.2d 1347 (Ala. Cr. App. 1981), and the Alabama Supreme Court denied the State's certiorari

petition. No. 81-216 (Ala. 1982). However, this Court granted the State's certiorari petition, vacated the judgment of the Court of Criminal Appeals, and remanded the case to that court for further consideration in light of *Hopper v. Evans*, 456 U.S. 605 (1982). *Alabama v. Horsley*, 102 S.Ct. 2921 (1982). On remand, after reconsidering the case in light of *Hopper v. Evans, supra*, the Court of Criminal Appeals affirmed Horsley's conviction and sentence. *Edward Horsley v. State*, No. 1 Div. 931 (Ala. Cr. App. Nov. 29, 1983).

Thereafter, pursuant to the automatic certiorari provisions of A.R.A.P. 39(c), the Alabama Supreme Court granted Horsley's petition for writ of certiorari. After the case had been submitted to the Alabama Supreme Court, it entered an order holding the case in abeyance pending the decision of this Court in the *Baldwin* case.

Herbert Lee Richardson v. State

On August 16, 1977, Richardson placed a bomb on the front porch of a dwelling house, located in a heavily populated residential area. The house was inhabited by several children and adults. One of the children, a ten-year-old girl, found the bomb and attempted to throw it away from herself and the house. Richardson had constructed the bomb in such a way that it would explode when moved, and it did so, blowing parts of the little girl's body over a two-block area. *Richardson v. State*, 376 So.2d 205 (Ala. Cr. App. 1978). Richardson was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(9) capital offense of willfully setting off an explosion near an inhabited dwelling house when a person is intentionally killed by the defendant as a result of the explosion. After conducting a sentence hearing at which it found that Richardson had knowingly committed a great risk of death to many persons, the trial court sentenced him to death.

On its initial review, the Alabama Court of Criminal Appeals remanded the case to the trial court because that court had failed to enter complete written findings as to aggravating and mitigating circumstances, which made it impossible for the Court of Criminal Appeals to review the sentencing decision. *Richardson v. State*, 376 So.2d at 223-224. Following remand, and the entry of complete written sentence findings by the trial court, the Court of Criminal Appeals affirmed the conviction and death sentence in the case. *Id.*, at 224-228. The Alabama Supreme Court affirmed that decision. *Ex parte Richardson*, 376 So.2d 228 (Ala. 1979).

Thereafter, Richardson sought a petition for a writ of error coram nobis in the State trial court, which was denied. The Alabama Court of Criminal Appeals affirmed that denial, *Richardson v. State*, 419 So.2d 289 (Ala. Cr. App. 1982), and the Alabama Supreme Court denied Richardson's certiorari petition to review that decision, No. 81-937 (Ala. 1982). This Court denied certiorari. *Richardson v. Alabama*, 103 S.Ct. 1262 (1983).

At the time this Court granted certiorari in the *Baldwin* case, the State had a motion to reset Richardson's execution date pending in the Alabama Supreme Court. However, that court has entered an order holding the State's motion in abeyance pending this Court's decision in the *Baldwin* case.

Wayne Eugene Ritter v. State

On January 5, 1977, Ritter and his co-defendant, John Louis Evans, robbed and murdered a store owner in front of the man's two young daughters. Although Ritter did not personally shoot the victim, he did participate in the crime with intent to kill and encouraged and supported Evans in the actual killing itself. At all stages of the proceeding in the trial court, Ritter boasted that he and Evans had an agreement to kill anybody who

went for a gun in one of their robberies, and that he would have killed the victim himself had Evans not been in his line of fire. *Ex parte Ritter*, 375 So.2d 270, 273, 275 (Ala. 1979); *Ritter v. Smith*, 568 F.Supp. 1499, 1509-1513 (S.D. Ala. 1983), *aff'd in part and rev'd in part*, 726 F.2d 1505 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 218 (1984). Ritter also actively sought the death penalty, demanded that he be executed, and threatened to harm the jury if he was not. *Ritter v. Smith*, 568 F.Supp. at 1505-1508; *Ritter v. State*, 429 So.2d 928, 929 (Ala. 1983).

Ritter was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(2) capital offense of robbery-intentional killing. After a sentence hearing, at which it was established that on approximately thirty-nine occasions Ritter had created a great risk of death to many persons, the trial court sentenced him to death. *Evans and Ritter v. State*, 361 So.2d 654, 664 (Ala. Cr. App. 1977). His conviction and death sentence were affirmed by the state appellate courts in a complicated series of decisions which is summarized in the Alabama Supreme Court's last decision in the case. *See, Ritter v. State*, 429 So.2d 928, 931-932 (Ala. 1983). Ritter filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Alabama. That court denied the petition, *Ritter v. Smith*, 568 F.Supp. 1499 (1983). Ritter appealed, and the Eleventh Circuit Court of Appeals reversed the district court's decision insofar as it concerned Ritter's death sentence. *Ritter v. Smith*, 726 F.2d 1505 (1984). This Court denied certiorari. *Smith v. Ritter*, 105 S.Ct. 218 (1984).

On December 3, 1984, pursuant to the Eleventh Circuit's decision, the United States District Court for the Southern District of Alabama entered an order granting Ritter's habeas petition "insofar as the sentence of death is concerned unless, on or before 180 days from the date

of this Order, the State of Alabama grants petitioner a new sentence proceeding." *Ritter v. Smith*, No. 83-0457-H (S.D. Ala.). Ritter has not yet been resentenced, and under the district court's order the State is not required to have him resentenced until June 1, 1985. The State intends to seek an extension of that deadline so that it may apply for a recall of the mandate in the Ritter case if this Court decides the sentence issue in the present case favorably to the State. Such a recall would be appropriate because the Eleventh Circuit's reversal of Ritter's sentence was predicated on a holding that the 1975 statute's sentence procedure was unconstitutional.

Phillip Wayne Tomlin v. State

On January 2, 1977, Tomlin and his hired "hit man" John Ronald Daniels, murdered nineteen-year-old Ricky Brune and fifteen-year-old Cheryl Moore by shooting them a number of times with a pistol and a sixteen-gauge shotgun. *Tomlin v. State*, 443 So.2d 47, 50-51 (Ala. Cr. App. 1979). Tomlin was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(7) capital offense of murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire, and the § 13-11-2(a)(10) capital offense of murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts. Following a sentence hearing, the trial court sentenced him to death.

On appeal, the Alabama Court of Criminal Appeals affirmed Tomlin's conviction but reversed the sentence and remanded the case for further sentence proceedings because of errors the trial court made in sentencing. *Tomlin v. State*, 443 So.2d at 57-59. The Alabama Supreme Court affirmed that decision. *Ex parte Tomlin*, 443 So.2d 59 (Ala. 1983).

Following new sentence proceedings, the trial court resentenced Tomlin to death. The new sentence is on

appeal to the Alabama Court of Criminal Appeals. However, that court has entered an order holding the case in abeyance until this Court issues its decision in the *Baldwin* case.

Freddie Lee Wright v. State

On December 2, 1977, Wright robbed a store being operated by Mr. and Mrs. Warran Green, whom he shot to death as they lay tied together back to back on the floor. Wright was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(2) capital offense of robbery-intentional killing, and the § 13-11-2(a)(10) capital offense of murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts. Following a sentence hearing before the trial court, he was sentenced to death.

Wright's conviction was reversed on *Beck* grounds by the Alabama Court of Criminal Appeals, *Wright v. State*, 407 So.2d 565 (Ala. Cr. App. 1981), and the Alabama Supreme Court denied the State's petition for a writ of certorari, *Ex parte State*, 407 So.2d 565 (Ala. 1981). However, this Court granted the State's petition for writ of certiorari, vacated the judgment of the Court of Criminal Appeals, and remanded the case to that court for further consideration in light of *Hopper v. Evans*, 456 U.S. 605 (1982). *Alabama v. Wright*, 102 S.Ct. 2920 (1982). As it has done in other pre-*Beck* death sentence cases pending before it, the Alabama Court of Criminal Appeals has entered an order holding this case in abeyance pending this Court's decision in the *Baldwin* case.

APPENDIX B

Capital Punishment Statutes Which Provide that if an Aggravating Circumstance or Circumstances Exist the Sentence Shall Be Death Unless Mitigating Circumstances Exist and Outweigh the Aggravating Circumstance(s):

Idaho Code § 19-2515(c) (Supp. 1984)

Md. Ann. Code, Art. 27 § 413(h) (1982)

Nev. Rev. Stat. § 200.030(4)(a) (1983)

N.J. Stat. Ann. § 2C:11-3(c)(3) (1982)

Okla. Stat. Title 21, § 701.11 (1981)

Tenn. Code Ann. § 39-2-203(g) (1982)

Capital Punishment Statutes Which Provide that if an Aggravating Circumstance or Circumstances Exist the Sentence Shall Be Death if the Aggravating Circumstance(s) Outweigh any Mitigating Circumstance(s) Which Exist:

Ala. Code § 13A-5-46(e)(3) (1982)

Cal. Penal Code Ann. § 190.3 (West Supp. 1984)

Ind. Code § 35-20-2-9(e), (g) (Supp. 1984)

Ohio Rev. Code Ann. § 2929.03(D)(2) (1982)

42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982)

Capital Punishment Statutes Which Provide that if an Aggravating Circumstance or Circumstances Exist the Sentence Shall Be Death Unless Sufficient Mitigating Circumstances Exist to Preclude the Death Sentence or Call for a Lesser Sentence:

Ariz. Rev. Stat. Ann. § 13-703(E) (Supp. 1984-1985)

Colo. Rev. Stat. § 16-11-103(2) (Supp. 1984)

Ill. Rev. Stat. ch. 38, ¶ 9-1(g) (1983)

Mont. Code Ann. § 46-18-305 (1983)

APPENDIX C

ALABAMA DEATH SENTENCE CASES TRIED UNDER THE 1975 CAPITAL PUNISHMENT STATUTE IN WHICH AT LEAST ONE OPINION WAS ISSUED BY THE ALABAMA APPELLATE COURTS BEFORE THE DECISION IN *BECK v. ALABAMA*, 447 U.S. 625 (1980) WAS ANNOUNCED

Cases in Which the Conviction Was Reversed

Ashlock v. State, 367 So.2d 560 (Ala. Cr. App. 1978)

Clements v. State, 370 So.2d 723 (Ala. 1979)

Hill v. State, 371 So.2d 60 (Ala. Cr. App. 1978) [first trial]

Jacobs (John L.) v. State, 371 So.2d 448 (Ala. 1979)

Watters v. State, 369 So.2d 1272 (Ala. 1979)

Whisenhant v. State, 370 So.2d 1080 (Ala. Cr. App.), *cert. denied*, 370 So.2d 1106 (Ala. 1979)

Cases in Which the Conviction Was Affirmed but the Sentence Was Reversed and the Case Remanded for Further Sentence Proceedings Because of Errors in the Sentence Hearing or Sentence Findings or Because the Death Sentence Was Deemed Inappropriate

**Berard v. State*, 402 So.2d 1044, 1049-1051 (Ala. Cr. App. 1980)

**Bufford v. Stat*, 382 So.2d 1162, 1173-1175 (Ala. Cr. App.), *cert. denied*, 382 So.2d 1175 (Ala. 1980)

Ex parte Bracewell (Charles), 407 So.2d 845, 847 (Ala. 1979)

**Bracewell (Debra) v. State*, 401 So.2d 123, 124 (Ala. 1979), *on remand*, 401 So.2d 124, 125 (Ala. Cr. App. 1980)

**Colley v. State*, 405 So.2d 374, 389-390 (Ala. Cr. App. 1979), *after first remandment*, 405 So.2d 391 (Ala. Cr. App. 1980) (on rehearing)

**Cook v. State*, 369 So.2d 1251, 1255-1257 (Ala. 1978)

**Hubbard v. State*, 382 So.2d 577, 596 (Ala. Cr. App. 1979)

**Ex parte Johnson*, 399 So.2d 873 (Ala. 1979)

Keller v. State, 380 So.2d 926, 936-937, *after remandment*, 380 So.2d 938 (Ala. Cr. App. 1979), *cert. denied*, 380 So.2d 938 (Ala. 1980)

Lewis v. State, 380 So.2d 970 (Ala. Cr. App. 1979), *after remandment*, 380 So.2d 978 (Ala. Cr. App. 1980)

**Mack v. State*, 375 So.2d 476, 500-501 (Ala. Cr. App. 1978), *after remandment*, 375 So.2d 501 (Ala. Cr. App. 1979)

**Morrison v. State*, 398 So.2d 730, 748 (Ala. Cr. App. 1979), *after remandment*, 398 So.2d 749 (Ala. Cr. App. 1979)

**Reed v. State*, 407 So.2d 153, 161-162 (Ala. Cr. App. 1980)

**Richardson v. State*, 376 So.2d 205, 223-224 (Ala. Cr. App. 1978), *after remandment*, 376 So.2d 224 (Ala. Cr. App. 1978)

Tomlin v State, 443 So.2d 47, 57-59 *aff'd*, 443 So.2d 59 (Ala. 1983)

Cases in Which the Conviction Was Affirmed and the Sentence Was Affirmed Without a Remand to the Trial Court for any New or Further Sentence Proceedings

Baldwin v. State, 372 So.2d 26 (Ala. Cr. App. 1978), *aff'd*, 372 So.2d 32 (Ala. 1979)

•*Beck v. State*, 365 So.2d 985 (Ala. Cr. App.), *aff'd*, 365 So.2d 1006 (Ala. 1978)

•*Cade v. State*, 375 So.2d 802 (Ala. Cr. App. 1978), *aff'd*, 375 So.2d 828 (Ala. 1979)

•*Coon v. State*, 380 So.2d 980 (Ala. Cr. App. 1979), *aff'd*, 380 So.2d 990 (Ala. 1980)

•*Crawford v. State*, 377 So.2d 145 (Ala. Cr. App.), *aff'd*, 377 So.2d 159 (Ala. 1979)

Evans v. State, 361 So.2d 654 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979)

Hill v. State, 371 So.2d 60 (Ala. Cr. App. 1978) [retrial]

Horsley v. State, 374 So.2d 363 (Ala. Cr. App. 1978), *aff'd*, 374 So.2d 375 (Ala. 1979)

••*Jacobs (Jerry Wayne) v. State*, 361 So.2d 607 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 640 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979)

•*Julius v. State*, 407 So.2d 141 (Ala. Cr. App. 1980)

Ritter v. State, 361 So.2d 654 (Ala. Cr. App. 1977), *aff'd in part and remanded in part*, 361 So.2d 666 (Ala. 1978), *aff'd on remand*, 375 So.2d 266 (Ala. Cr. App. 1978), *aff'd after remand*, 375 So.2d 270 (Ala. 1979)

••*Thomas v. State*, 373 So.2d 1149 (Ala. Cr. App.), *aff'd*, 373 So.2d 1167 (Ala. 1979)

•*Williamson v. State*, 370 So.2d 1054 (Ala. Cr. App. 1978), *aff'd*, 370 So.2d 1066 (Ala. 1979)

•*Wilson v. State*, 371 So.2d 932 (Ala. Cr. App. 1978), *aff'd*, 371 So.2d 943 (Ala. 1979)

Explanatory Notes

An asterisk (•) indicates cases in which the conviction was reversed in later direct appeal proceedings on *Beck v. Alabama*, 447 U.S. 625 (1980), grounds.

Two asterisks (••) indicate cases in which the conviction was later reversed in state court collateral proceedings on *Beck v. Alabama*, 447 U.S. 625 (1980), grounds.

The second category of cases, those in which the conviction was affirmed but the death sentence was reversed and the case remanded for further sentence proceedings, includes cases in which the death sentence was reimposed by the trial court after new proceedings and was affirmed on appeal, as well as cases in which the new sentence proceedings resulted in a life without parole sentence.

All cases, including some summarized in Appendix A, in which no appellate opinion was issued before the *Beck* decision was announced have been omitted.